TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 133

PARRIS SINKLER, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS
OF THE STATE OF TEXAS, NINTH SUPREME JUDICIAL DISTRICT

PETITION FOR CERTIORARI FILED MAY 22, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 133

PARRIS SINKLER, PETITIONER,

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MISSOURI PACIFIC RAILROAD COMPANY

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 23, 1957

[fol. 4]

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 61ST JUDICIAL DISTRICT

No. 403,470

PARRIS SINKLER

v.

GUY A. THOMPSON, TRUSTEE, ET AL.

PLAINTIFF'S THIRD AMENDED ORIGINAL PETITION—
Filed April 5, 1954

To the Honorable Judge of Said Court:

Now comes Parris Sinkler, hereinafter called Plaintiff, and complaining of Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor; Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor; Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor; Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor; and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, hereinafter called defendants, by leave of court first had and obtained, files this, his third amended original petition, and for cause of action respectfully shows the Court the following:

I.

Plaintiff is and has been at all times *petinent* (sic) hereto, a resident of Harris County, Texas. Guy A. Thompson is, and at all times hereafter mentioned was, the duly appointed, qualified and acting Trustee in Bankruptcy of each of the above named debtor companies, having been appointed as such by the United States District Court for the Eastern District of Missouri, Eastern Division, in proceedings there pending under Section 77 of the Federal Bankruptcy Act, as amended, entitled "In the Matter of Missouri Pacific Railroad Company, Debtor, in Proceedings for the Reor-

ganization of a Railroad, No. 6935 on the docket of said Court; and, in such capacity, the said Guy A. Thompson is now, and was at all times pertinent hereto, engaged in operating the properties formerly owned by each of the [fol. 5] above named debtor companies, and thus was engaged, as a common carrier by railroad, in commerce between the several states and with foreign nations.

II.

On or about March 30, 1949, and for several years before and after that date, plaintiff was employed by the defendants, and each of them, in such commerce, as a cook on the business, office or official railroad car assigned to and used by the General Manager of defendants, and each of them. Up until December 31, 1951, the said General Manager was A. B. Kelly. Since January 1, 1952, the said General Manager has been Samuel Hammer. At all times hereinafter when the said term "General Manager" is used, it will refer to whichever of the above named persons held the office at the particular time. The said General Manager was and is the chief operating officer of the defendants, and each of them; and was and is charged with and responsible for the operation and maintenance of all of the lines of railroad operated by defendants, except the Trustee of Missouri Pacific Railroad Company, in which case he had and has jurisdiction only of the line between Alexandria, Louisiana and Lake Charles, Louisiana. In connection with the carrying out of his duties as chief operating officer, it was and is necessary for the said General Manager to travel about the States of Texas and Louisiana upon the lines of the respective defendants, to observe the condition of the defendants' road beds and to give instructions relating to the maintenance and operation thereof, and to consult with various others of defendants' officers and agents such as division superintendents, train masters, road masters and local agents, with regard to various phases of the defendants' business. Such travels are usually performed in the above mentioned business, office or official railroad car assigned for the exclusive use of the said General Manager, [fol. 6] which is equipped in all respects as an office, and

which provides accommodations for the General Manager's secretary, who accompanies him on all such trips, and for such other officers and agents of the defendants as he may desire to have accompany him or to visit and confer with him aboard such car. In the course of his said travels upon the lines of the various defendants, the said General Manager gives daily attention not only to the problems of the particular line upon which he is traveling, but to the problems arising upon lines of all of the defendants, and conducts extensive correspondence, by mail and by telegraph and telephone with respect to all of such problems.

III.

The duties of plaintiff in his capacity as a cook on the car so assigned by defendants to the said General Manager, were to provide for the comfort, convenience and welfare of the said General Manager, his secretary and such other agents of the defendants as might travel with, or visit or confer with, the said General Manager while he was on and traveling over the defendants' lines in the performance of his said duties. The duties of the plaintiff in such capacity included the furtherance of interstate and foreign commerce, and his performance thereof (in which he was engaged at the time of his injuries, below alleged) affected such commerce directly, closely and substantially.

IV.

On or about March 30, 1949, while plaintiff was so employed, and while he was engaged in the performance of his duties as such cook, the said car, carrying the defendants' said General Manager, arrived in Houston from the South, about 3:15 P. M., on the train of the Trustee of The St. Louis, Brownsville and Mexico Railway Company, known as the Valley Eagle. The said car arrived on one of [fol. 7] the northerly tracks leading to and serving the Union Station in Houston, Texas and shortly thereafter, at about 4:00 P. M., the said car, with plaintiff therein, was moved, by a switch engine operated by a crew composed of agents, servants and employees of the defendants, from the said track to a track on the south side of the tracks leading

to the Union Station, nearer to Texas Avenue, probably the track known and designated as Track No. 8. When the said car was moved onto such other track (Track No. 8), other cars were then already standing on that track. The car carrying plaintiff was pushed or shoved onto such other track (Track No. 8) and into the cars standing thereon, in such a violent, reckless, careless and negligent manner that it struck the cars already standing on said track with great force and violence. In this connection the plaintiff shows that the agents, servants and employees of the defendants were guilty of one or more of the following negligent acts and omissions, proximately causing the collision between the car in which the plaintiff was riding and the cars that had already been placed on the track:

(1) In failing to have the switch engine handling the car in which the plaintiff was riding under proper control.

(2) In failing to have the car in which the plaintiff was riding under proper control.

(3) In failing to timely apply the brakes of the switch engine handling the car in which the plaintiff was riding.

(4) In failing to timely slow the switch engine handling the car in which the plaintiff was riding.

(5) In failing to timely slow the car in which the plaintiff was riding.

[fol. 8] (6) In pushing the car in which the plaintiff was riding against the standing cars with excessive force.

(7) In failing to keep a proper lookout for the position of the standing cars when moving the car in which the plaintiff was riding onto the track where the standing cars had been spotted.

The plaintiff shows that one or more of the above negligent acts and omissions on the part of the defendants, acting through their agents, servants and employees proximately caused and contributed to the injuries, losses and

damages sustained by the plaintiff, all of which will he (sic) hereinafter more fully described.

* * * * * * *

[fol. 10] VI.

As a direct and proximate result of the collision of March 30, 1949, and of being violently thrown about, shaken, battered and bruised as a result of the said collision of March 30, 1949 the plaintiff sustained a rupture of the supra spinalis muscle of the left side of his body; calcification in the deltiod (sic) bursae of both right and left shoulders, and impairment of motion and function in both shoulder joints; a tearing, straining and pinching of the ligaments, muscles, tissues, joints and joint spaces, nerves and nerve structures of the upper portion of his spine, shoulders, arms, neck and face. In addition thereto he sustained severe trauinatic shock to his entire nervous system.

By reason of the injuries above alleged, for some time [fol. 11] after the above described accident of March 30, 1949, and, from time to time thereafter, the plaintiff was wholly disabled from working and earning money. Further, from and after such date of March 30, 1949 the plaintiff has been continually under the care and attention of doctors and on or about the 23rd day of May, 1950 it became necessary for an operation to be performed on his shoulder because of the injuries sustained in the accident of March 30, 1949. Following such operation he eventually returned to the performance of his work on or about the 1st day of January, 1951. From that date until on or about March 3, 1953. the plaintiff endured severe mental and physical pain and suffering as a direct and proximate result of the collision of March 30, 1949.

* * * * * * *

[fol. 12] As a direct and proximate result of his injuries sustained the plaintiff has been damaged in the total sum of $100,000.00 for which he sues.

Wherefore premises considered, plaintiff prays that upon final hearing of this cause he have judgment against the defendants, jointly and severally, or, in the alternative,

apportioned according to law, for his damages sustained, that he recover his costs in this behalf expended and for such other and further relief, general and special, legal and equitable, to which he has shown, or may show himself justly entitled.

Kelley & Ryan, /s/ by C. O. Ryan; Smith & Lehmann,
[fol. 13] /s/ J. Edwin Smith, Attorneys for Plaintiff, Parris Sinkler.

[File endorsement omitted]

[fol. 14] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
61ST JUDICIAL DISTRICT

[Title omitted]

THIRD AMENDED ORIGINAL ANSWER—Filed January 4, 1955

To the Honorable Judge of Said Court:

Comes Now Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Guy A. Thompson, Trustee, The St. Louis, Brownsville & Mexico Railway Company, Guy A. Thompson, Trustee, Missouri Pacific Railway Company, defendants in the above styled and numbered cause, and by leave of court had and obtained, files this their third amended original answer to plaintiff's third amended original petition on file herein, and would respectfully show unto the Court the following:

I.

Defendants and each of them deny all and singular the allegations contained in plaintiff's said petition, say the same are not true in whole or in part and demanding strict proof of the same put themselves upon the country.

II.

For further answer herein, if such be necessary these defendants would show that plaintiff's cause of action, if any, as a result of the accident occuring (sic) on or about March 30, 1949, occurred more than two (2) years before the commencement of this suit and that the same is barred by the two (2) year Statute of limitation and this they are ready to verify.

[fol. 15] III.

Defendants specially deny that the switch engine moving the car in which plaintiff was riding on or about March 30, 1949, as alleged in Paragraph IV of plaintiff's petition was being operated by a crew composed of agents and servants of these defendants, but on the contrary defendants say that said switch engine was owned and operated by the agents, servants and employees of the Houston Belt & Terminal Railway Company, a Texas corporation and any accident resulting from said movement on the occasion in question, the occurrence of which is specially denied, was caused by the agents, servants and employees of the said Houston Belt & Terminal Railway Company and not by any agent, servant or employee of any of the defendants herein.

* * * * * * *

[fol. 17] Wherefore, defendants and each of them pray that plaintiff take nothing by his suit and that defendants and each of them go hence without day, and have an (sic) recover of plaintiff herein all costs incurred.

Woodul, Arterbury & Wren, by /s/ Howard S. Hoover, 818 Chrinicle (sic) Building, Houston 2, Texas, Attorneys for Defendants.

* * * * * * *

[fol. 18] [File endorsement omitted]

[fol. 19] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
61ST JUDICIAL DISTRICT

[Title omitted]

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO—
Filed January 26, 1955

Comes Now Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Guy A. Thompson, The St. Louis, Brownsville & Mexico Railway Company and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, the defendants in the above styled and numbered cause, and after the verdict of the jury in said cause had been received and filed, moves the Court to enter judgment in favor of said defendants notwithstanding the verdict of the jury and to enter judgment herein for defendants, for the following reasons, to-wit:

I.

Defendants prepared and submitted to the Court, before the Court's charge was submitted to the jury, their motion for an instructed verdict, the basis of which motion in part was that the plaintiff sought to base his suit principally on an alleged act of negligence upon the part of the Houston Belt & Terminal Railway Company, a Texas corporation, and an independent legal entity, under the theory that the Houston Belt & Terminal Railway Company in committing said act of negligence was acting as an agent of the named defendants. This theory was adopted by the plaintiff for no other reason than that at the time he put his case in the hands of his attorneys his suit against the Houston Belt & Terminal Railway Company was barred by the two year statute of limitation. Because of such fact, he has sought to bring his case within the purview of the three year statute [fol. 20] of limitation available under the Federal Employers' Liability Act as an employee of a railroad company which is engaged in interstate commerce and which negligently commits an act which proximately results in injury

to such employee. Plaintiff's theory is unsound and defendants' motion for an instructed verdict should have been granted.

In this connection, the defendants would show that (1) under the law applicable to the facts of this case, both general and statutory, the Houston Belt & Terminal Railway Company was on the occasion in question acting wholly as a principal for its own account in pursuance of its charter powers and not as an agent for another railroad company; (2) The plaintiff was an employee solely of one of the defendants herein and in nonsense (sic) was he an employee of the Houston Belt & Terminal Railway Company. His cause of action, therefore, being based upon an act of the Houston Belt & Terminal Railway Company comes within the purview of and is controlled by the two year statute of limitation. (3) It is undisputed that on March 30, 1949, the date of the first injury alleged by the plaintiff, the plaintiff was an employee of one or more of the defendants named in this suit. It is likewise established without contradiction that he was in no sense an employee of the Houston Belt & Terminal Railway Company, an entirely separate, independent legal entity. If the plaintiff is correct in his theory that the defendants herein are liable for the acts of the Houston Belt & Terminal Railway Company, on the theory that the Houston Belt & Terminal Company was on the occasion in question acting as an agent of one or more of the defendants, then his cause of action of necessity is subject to the defenses that would be available to the Houston Belt & Terminal Railway Company should his suit have been brought against the Houston Belt & Terminal Railway Company. One of these defenses [fol. 21] would be that the cause of action was at the time it was filed barred by the two year statute of limitation. Under the law, the period of limitation that is applicable as a defense to the agent, should the suit be brought against the agent, is applicable and available to the principal in a case brought against the principal instead of the agent.

* * * * * * *

III.

The record wholly fails to establish by any competent evidence any factual basis for liability of the defendants or any one of them for the accident that happened on March [fol. 22] 30, 1949, and the resulting injuries, if any, to the plaintiff. The evidence in the record shows without any character of dispute that the accident complained of which is alleged to have happened on March 30, 1949, resulted solely from the acts of the servants, agents and employees of the Houston Belt & Terminal Railway Company, a Texas corporation, an independent legal entitly, (sic) who at the time of said accident were acting wholly within the scope of their employment, with and for the Houston Belt & Terminal Railway Company. The evidence further establishes without any character of dispute that no act, either of comission (sic) or omission upon the part of any agent, servant or employee of the defendants herein, or either of them, had any connection directly or indirectly with the handling of the car at the time of and immediately before the collision which is made the basis of plaintiff's cause of action with reference to the alleged accident which happened on March 30, 1949.

IV.

All the competent evidence in the record establishes clearly and without controversy that the accident of March 30, 1949, which is made the basis in part of plaintiff's suit was the proximate result of a switching operation which the Houston Belt & Terminal Railway Company was making in the due course of its business and in the pursuance of its charter powers under the Acts of the Revised Civil Statutes of Texas under which it was duly and legally incorporated.

Wherefore, defendants pray that this Honorable Court disregard the answers of the jury as to the Special Issues submitted in connection with the accident of March 30, 1949, and to enter judgment for defendants, and that plaintiff take nothing by his suit notwithstanding the verdict of the jury in accordance with a copy of the Order and Decree hereto attached.

[fol. 24] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
61ST JUDICIAL DISTRICT

[Title omitted]

JUDGMENT—February 9, 1955

Be It Remembered That on the 10th day of January, 1955, came on to be heard in its regular order the above entitled and numbered cause; and came the plaintiff, Parris Sinkler, in person and by and through his attorneys of record, and came the defendants, Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor, Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor, Guy A. Thompson, Trustee, The St. Luis, (sic) Brownsville and Mexico Railroad Company, Debtor, and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, by and through their attorneys of record and all parties announced ready for trial. Then came a jury consisting of Frank H. Smith and eleven (11) other good and lawful men, who were duly impaneled and sworn, and proceeded to hear this cause.

Thereupon, the taking of testimony commenced and continued from day to day until Friday, January 14, 1955, when all parties rested. And the said jury having heard the pleadings, the evidence and argument of counsel, for their verdict, and in response to the following special issues submitted to them by the Court, did, on January 18, 1955, make the following respective findings:

Special Issue No. 1

From a preponderance of the evidence, do you find that at the time of sustaining his injuries, if any, on March 30, 1949, the plaintiff, Parris Sinkler, was acting within the course and scope of his employment for his employer?

Answer: "We do" or "We do not."

[fol. 25] To which the jury answered: "We do."

Special Issue No. 2

From a preponderance of the evidence, do you find that at the time of sustaining his injuries, if any, on March 3, 1953, the plaintiff, Parris Sinkler, was acting within the course and scope of his employment for his employer?

Answer: "We do" or "We do not."

To which the jury answered: "We do."

Special Issue No. 3

From a preponderance of the evidence, do you find that in switching the General Manager's car the Houston Belt & Terminal Railroad Company was acting as agent for Guy A. Thompson, Trustee of the Beaumont, Sour Lake & Western Railway Company, and Guy A. Thompson, Trustee of the St. Louis, Brownsville & Mexico Railway Company?

Answer: "We do" or "We do not."

In connection with the foregoing Issue you are instructed that an agent is defined as one who undertakes to transact some business, or to manage some affair, for another, by the authority of and on the account of the latter, and to render an account of it, but who does not reserve for itself the right of using its own means and methods for the performance of such business and who submits itself to the right of control and supervision of the other with respect to all the details of such work.

To which the jury answered: "We do."

Special Issue No. 4

Do you find from a preponderance of the evidence that the Houston Belt & Terminal Railway Company was an independent contractor in the use of its switching engine and crew in moving the General Manager's car in which plaintiff was riding on March 30, 1949?

Answer: "We do" or "We do not."

[fol. 26] By the term "independent contractor" as used in the foregoing issue is meant a company which in the pur-

suit of an independent business, undertakes doing a specific piece of work for others, using its own means and methods, without submitting itself to their control in respect to all its details and thereby represents the will of others for whom the work is being done only as to the result of its work, and not as to the means by which it is accomplished.

To which the jury answered: "We do not."

Special Issue No. 5

From a preponderance of the evidence, do you find that on March 30, 1949 the switching crew shoved the General Manager's car against the standing cars with excessive force?

Answer: "We do" or "We do not."

By the term "excessive force" as used in the foregoing Issue is meant a force in excess of that with which a person or (sic) ordinary prudence in the exercise of ordinary care would have shoved the General Manager's car.

To which the jury answered: "We do."

If you have answered the preceding Special Issue "We do", and only in that event, then answer:

Special Issue No. 6

From a preponderance of the evidence, do you find that such shoving, if any, was a proximate cause of the injuries, if any, sustained by the plaintiff, Parris Sinkler, on March 30, 1949?

Answer: "We do" or "We do not."

To which the jury answered: "We do."

Special Issue No. 7

From a preponderance of the evidence, do you find that on March 30, 1949, the switching crew handling the General Manager's car failed to have the said car under proper control?

Answer: "We do" or "We do not."

[fol. 27] By the term "Proper control" as used in the foregoing Issue, is meant such control as a person of ordinary prudence in the exercise of ordinary care would have used in the handling of said car under the same or similar circumstances.

To which the jury answered: "We do".

If you have answered the preceding Special Issue "We do", and only in that event, then answer:

Special Issue No. 8

From a preponderance of the evidence, do you find that such failure, if any, was a proximate cause of the injuries, if any, sustained by the plaintiff, Parris Sinkler, on March 30, 1949?

Answer: "We do" or "We do not."

To which the jury answered: "We do."

* * * * * * *

[fol. 31] Whereupon, plaintiff having filed his motion for judgment upon said verdict, and the defendants having filed their motion for judgment notwithstanding the said verdict, and both of said motions, after due notice of the filing thereof, having been set for hearing, and all parties having appeared by and through their attorneys of record at such hearing, and the Court having considered the pleadings, the evidence, the verdict, said motions and the argument of counsel thereon and being fully advised in the premises, is of the opinion and finds that plaintiff's motion for judgment should be and it is hereby granted and that defendants' motion for judgment notwithstanding the verdict should be and it is hereby overruled.

It Is Therefore Ordered, Adjudged and Decreed by the Court that plaintiff, Parris Sinkler, do have and recover of and from the defendants, Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor, and Guy A. Thompson, Trustee, The St. Louis, Brownsville and Mexico Railway Company, Debtor, jointly and severally, the sum of Fifteen Thousand

Dollars ($15,000.00), with interest thereon at the rate of six per cent (6%) per annum from the date of this judgment, together with all of his costs in this behalf expended; all of said recovery being attributable, under the verdict of the jury, to the injuries and damages sustained as a result of the accident of March 30, 1949, and none of such recovery being attributable to the alleged injuries and damages sustained as a result of the accident of March 3, 1953.

[fol. 32] It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing against the defendants for the alleged injuries sustained by him as a result of the accident of March 3, 1953.

It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing against defendants Guy A. Thompson, Trustee, International-Great Northern Railroad Company, Debtor, and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and that said defendants go hence without day.

It Is Further Ordered that this judgment be certified to the United States District Court for the Eastern District of Missouri, Eastern Division, the Court having jurisdiction of the reorganization of the defendants, for payment.

To which judgment the defendants Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, Debtor, and Guy A. Thompson, Trustee, the St. Louis, Brownsville and Mexico Railway Company, Debtor, then and there in open court duly excepted.

Rendered and signed this 9th day of February, 1955.

/s/ Ben F. Wilson, Judge Presiding.

Approved as to Form:

Kelley & Ryan, Smith & Lehamn (sic), by /s/ C. O. Ryan, Attorneys for Plaintiff.

Woodul, Arterbury & Wren, by /s/ Roy L. Arterbury, Attorneys for Defendants.

* * * * * * *

[fol. 33] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
61ST JUDICIAL DISTRICT

[Title omitted]

STATEMENT OF THE POINTS TO BE RELIED UPON—
Filed April 8, 1955

Comes Now Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Guy A. Thompson, Trustee, St. Louis, Brownsville & Mexico Railway Company, and Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, pursuant to rule 377-A of Vernon's Texas Rules of Civil Procedure, and file this a statement of the points on which they intend to rely on appeal, and say that they intend to rely upon the following points:

I.

Since the uncontradicted evidence clearly shows that on March 30, 1949 the Houston Belt & Terminal Railway Company was switching the car in question in the capacity of an independent contractor, the trial court erred in overruling Defendants' motion for instructed verdict, with reference to the occurrence of March 30, 1949. (Germane to assignment of error No. 1).

II.

Since the uncontradicted evidence clearly shows that on March 30, 1949, the Houston Belt & Terminal Railway Company was switching the railroad Car in question in the capacity of an independent contractor, the trial court erred in overruling the Defendants' motion for judgment, non obstante verdicto (sic). (Germane to assignment of error No. II).

III.

Since in a suit against a principal seeking to recover damages proximately caused by the negligent acts of its [fol. 34] alleged agents all of the defenses available to the alleged agent are available to the principal, the trial court

erred in overruling and in not sustaining Defendants' motion for instructed verdict with reference to the cause of action occurring on March 30, 1949, because more than two years elapsed between March 30, 1949 and the date this suit was filed. (Germane to assignment No. 1 (2) & (3).)

IV.

There is no competent evidence in the record to raise an issue of fact as to whether the Houston Belt & Terminal Railway Company was acting as an agent of the Defendants on the occasion in question. (Germane to Assignment of error No. 1 (5).)

V.

The court erred in submitted (sic) special issue No. 3 to the jury for the reason that said issue was not raised by any competent evidence in the record. (Germane to assignment of error No. V).

VI.

The court erred in submitting special issue No. 4 to the jury for the reason that the uncontradicted evidence shows as a matter of law that the Houston Belt & Terminal Railway Company was acting as an independent contractor in switching the car in question on March 30, 1949. (Germane to assignment of error No. VI).

VII.

The court erred in admitting into evidence those portions of the operating contracts between Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company and Guy A. Thompson, Trustee, St. Louis, Brownsville & Mexico Railway Company and other companies not parties to this law suit on the one part, and the Houston Belt & Terminal Railway Company, on the other part, and those portions of the application of these De-
[fol. 35] fendants and others to the Interstate Commerce Commission and the opinion of the Interstate Commerce Commission in which reference is made to the Houston Belt

& Terminal Railway Company as being the "agent" of those Defendants and that the Houston Belt & Terminal Railway Company was "under the joint control of" of (sic) these Defendants and other stockholding lines for the reason that said statements were merely conclusions and opinions of the authors of said instruments and not facts upon which jury finds could properly be predicated. (Germane to assignment of Error No. XVIII).

VIII.

The Court erred in admitting into evidence section 2 of Article 3 of the operating agreement between Guy A. Thompson, Trustee, The Beaumont, Sour Lake & Western Railway Company, and Guy A. Thompson, Trustee, The St. Louis Brownsville & Mexico Railway Company, and others on the one part, and the Houston Belt & Terminal Railway Company, and others, on the one part, and the Houston Belt & Terminal Railway Company on the other part, for the reason that said provision in said contract is wholly void in that it is contrary to the declared public policy of the State of Texas. (Germane to assignment of error No. XIX).

Respectfully designated,

Woodul, Arterbury & Wren, by /s/ Howard S. Hoover.

I, Carroll R. Graham, an associate of the firm of Woodul, Arterbury & Wren, Attorneys of record for Defendants, hereby certify that I delivered an exact copy of the above and foregoing instrument to Kelley & Ryan, Gulf Building Addition, Houston, Texas, and to Smith & Lehman (sic), Scanlan Building, Houston, Texas, attorneys for Plaintiff, Parris Sinkler, this the 8th day of April 1955.

/s/ Carroll R. Graham

[File endorsement omitted]

[fol. 36] [File endorsement omitted.]

* * * * * * *

[fol. 38] IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
61ST JUDICIAL DISTRICT

Statement of Facts—Filed May 12, 1955

(9:00 o'clock A.M., January 11, 1955)

PARRIS SINKLER, the plaintiff, called as a witness in his own behalf, having been duly sworn, in response to questions propounded to him, testified as follows:

Direct examination.

Questions by Mr. Smith:

Q. Give us your name.
A. Parris Sinkler.
Q. Will you speak out loud now so his Honor on the Bench and the jury in the box can all hear what you say.
Q. Where do you live?
A. 5213 Westheimer.
Q. Is that in Houston?
A. Yes, sir.
Q. How long have you lived there?
A. Oh, about seven years.
Q. Are you a native of Harris County?
A. Yes, sir.
Q. How old are you?
A. Fifty-one years old.
Q. You are, of course, the plaintiff against this defendant Guy A. Thompson, Trustee, of the various railroads?
A. Yes, sir.

* * * * * * *

[fol. 40] Q. Will you state for me and for the jury the approximate year or date that you went to work for the din-
[fol. 41] ing car department of the Missouri Pacific Lines?
A. It was in the month of December—it was the 16th of September, 1942.

Q. September 16, 1942, is that correct?

A. Yes, sir.

Q. All right. What were your approximate wages, Parris, when you were working for the D'Arcy Ice Cream Company?

A. I made $32.50 per week.

Q. Do you recall what you made when you were with the St. Regis Ice Cream Company?

A. Well, my wages rose from $25.00 up to $32.50 a week.

Q. When you left D'Arcy and went into the employ of the Missouri Pacific Lines in the dining car department, what position did you have at the beginning?

A. I was fourth cook; I began at fourth cook.

Q. Explain to the jury what fourth cook is.

A. Well, the fourth cook is the dishwasher on the diner. I started washing dishes, peeling potatoes, and things like that.

Q. Is that the lowest position in the dining car service?

A. Yes, sir.

Q. At what rates did you serve as fourth cook?

A. We worked by the hour, and the fourth cook's pay at that time was about 59 cents an hour, I believe.

Q. 59 cents an hour?

A. About that.

Q. About how long did you continue to work as fourth cook which you said was the potato peeling and the dishwasher.

A. When we went out with a small crew I would be the third cook.

Q. What was the duty of the third cook?

A. The third cook was the same as the fourth cook.

Q. Were you ever advanced to the position of second cook?

A. Yes, sir.

[fol. 42] Q. About how long after you went into their employment before you became second cook?

A. Well, it was about a year,—I will say about a year. It depends. If we carried a small crew, where we feed a small bunch of service men we would carry two cooks and I would be second cook, but on the regular line I was sometimes second cook. I worked on the service trains some.

Q. By service trains you mean a train that carries troops?

A. Yes, I served many soldiers.

Q. Did you ever advance from that position to first cook on the dining car?

A. I was first cook once or twice on troop trains.

Q. After that when you would run as first cook, once or twice on the troop trains, were you ever designated or classified as first cook on regular civilian traffic?

A. No, sir.

Q. Did you have the same seniority, rules and regulations as to the cooks as they do with the engineers and firemen and that sort of thing, where the one that had been there the longest had certain rights ahead of those that came on later?

A. Yes, sir.

Q. After you had served as dining car cook, second cook on occasions, making runs as first cook, were you ever placed in a different type of department by any people on the railroad? By that I mean were you ever advanced or designated to do a different type of work?

A. While I was cook on the diner car?

Q. Yes.

A. While I was cook with the crew, that is what you mean?

Q. No. My question is after you had served as dining car cook, were you ever designated by the railroad for any other occupation or position?

[fol. 43] A. No, sir.

Q. I don't think you understand my question.

A. No, I don't.

Q. Were you ever designated to become a private cook, to the general manager?

A. Yes, sir.

Q. That is what I am trying to get at.

A. Oh, yes, sir.

Q. When did you become private cook to the general manager?

A. About February 15, 1946.

Q. Now, at that time who was the general manager?

A. Mr. A. B. Kelley.

Q. Did you apply to be private cook to the general manager, or did you pass the examination to become a private cook, or were you picked out by some one to become a private cook?

A. I was picked out.

Q. Who picked you out?

A. Mr. W. A. Gall, he was superintendent of the dining car department.

Q. He was in the dining car department, sort of top man over the various cooks?

A. He was the top man in the dining car department in this division.

Q. He picked you to be designated as private cook to Mr. A. B. Kelley?

A. Yes, sir.

Q. Now, the car on which you served as private cook when you went to work in 1946, what number car was that?

A. Number 22.

Q. Was that a car on which any of the people who were on the train as ordinary passengers could use, or was it a private car designated specifically for the use of the general manager?

[fol. 44] A. It was used for the special use of the general manager and his guests.

Q. Will you explain to the jury what your duties were and what service you performed as private cook on the general manager's private car?

A. Well, we would get orders to go out on a trip, and I would get my requisition and fill it out and put it at the commissary, and they would fill my requisition and then we would pick it up and load it on the wagon and pull it out to the private car, and we would supply it. We would prepare—if we were going out at night—we would prepare in the day time to be ready to go out at night. When we were out on the trip we served three meals a day, and give the boss the best of everything in the line of service, and served all of his guests whenever he ordered them served.

Q. When you were on the general manager's private car state whether or not your duties included cooking his meals for him and his guests?

A. Yes, sir.

Q. State whether or not your duties included cleaning up the kitchen and the ice boxes, and the equipment in the kitchen after you had served the meals?

A. Oh, yes. After the meal we would have to clean the kitchen, clean the dishes and the pots, and everything after every meal and see that everything was in shipshape when we got in before we left the car.

Q. What were your instructions from the boss man as to keeping things clean and sanitary for the welfare and health of the general manager and his guests?

A. He would not tolerate any filth, any roaches, rats or anything. We had to report those when they were seen on the car so they could be exterminated. Before we left the car we would have to have it clean and sanitary before we [fol. 45] left in order for it to be ready on another trip at any moment.

Q. When you were serving with the general manager, Mr. A. B. Kelley as his private cook on his private car, where would this car travel and go with Mr. Kelley on it and you serving on it? Describe to the jury the various trips you would make and the various places you would go, and the time you would be gone on those trips.

A. We would go everywhere the boss had to go. We would go off in his division. We would go out on his division and sometimes off the division. We have gone to Omaha, Nebraska, gone to Mexico, to St. Louis many times, and——

Q. Did you make trips at times to New Orleans?

A. Yes, sir.

Q. Baton Rouge?

A. Yes, sir.

Q. You made trips to Mexico City?

A. Yes, sir.

Q. Omaha, Nebraska?

A. Yes, sir.

Q. Brownsville?

A. Yes, sir.

Q. Harlingen?

A. Yes, sir.

Q. Palestine?

A. Yes, sir, and San Antonio.

Q. Now, at the time those trips were made, was the general manager's private car just attached to an engine, or would it be attached to a regular passenger train?

A. It would be attached to a regular passenger train, or sometimes on the back of a freight train.

Q. Do you recall who would be the normal crew on the private car, not including the guests, just the people who [fol. 46] would normally travel there?

A. Well, the boss.

Q. That would be Mr. A. B. Kelley?

A. Yes, sir, and his secretary, at that time Mr. Lloyd Sellerman, and the porter, I. D. Walton and myself.

Q. In other words the crew was made up of the porter, I. D. Walton, you as the cook, then the boss and his secretary?

A. Yes sir.

Q. On occasions did you have other people with you?

A. Oh, yes, we would take members of his staff.

Q. That is of the general manager's staff?

A. Yes, sir, he would take them as his guests sometimes, and sometimes he would loan his car to other members of the railroad, such as the executives, and I have taken the vice-President, Mr. Bates, out on it, and Mr. Bruns, Many times.

Q. Now, at times have you had occasion when you were the cook on that private car, to serve business guests who would be there as a guest of Mr. Kelley in business relations with the railroad?

A. Yes, sir.

Q. Did that frequently happen?

A. Frequently, yes, sir.

Q. At the time you were private cook on Mr. A. B. Kelley's private car while he was general manager of the railroad what was your salary?

A. My salary was about $250.00 a month. I believe it started at about that much, I don't know exactly.

Q. Did your salary increase before you quit working?

A. Yes, sir.

Q. And the last time you were working there what was your approximate salary?

A. I believe it was $323.16.

[fol. 47] Q. Per month?

A. Yes, sir.

Q. Tell the Court and jury whether or not in addition to the salary you ever received any tips or other compensation on the private car from anyone?

A. Yes, sir, we would receive tips.

Q. And from whom would you receive those tips?

A. Well, from the boss and his guests, people that would come in, they would give up (sic) tips.

Q. I want you, if you will, to detail and outline for the jury what your duties were in relation to the private car, and the occupants of the private car under the circumstances where you would have made a trip out of Houston, no matter it would be, whether Mexico City, Omaha or New Orleans. Fix your mind, when you came back to Houston, and as you were coming into the station and the train comes to a stop. Do you get my inquiry there?

A. Yes, sir.

Q. Explain what your duties were from the time the train started coming into the City, and from then on.

A. When the train would come to the station it would be our duty, my duty, and the porter's duty, to see to getting the boss's bags, and I would go get a wagon or carriage and we would load the boss's belongings on there, and if he had his wife, her belongings would be there and we would put them on the wagon. Then I would go across the street to the Ben Milam Hotel where they give me orders to pick up the boss's car. That is the car that was furnished by the Company for the boss to take his belongings home. We would load from the carriage or wagon into the car, and I would take the boss and his madam home, if she was along with him. Then I would come back to the car and finish my work, and after the work is finished we could go home. [fol. 48] Q. What do you mean by when you would come back to the car you would finish your work?

A. Well, there was work undone, especially when you come in off a trip. We had to have things in shipshape to go back out on the spur of the moment any time. We are left a certain amount of supplies, even perishables, and we have to see that the car is properly iced again before we leave the car in order that the perishables won't spoil

and everything has to be cleaned up in shipshape before leaving the car.

Q. By cleaning and shipshape you mean your dishes had to be wiped and dried?

A. Yes, sir, washed and dried at all times.

Q. And the floors mopped?

A. Yes, sir, and the ice boxes had to be cleaned and everything.

Q. Were your duties over with in connection with that trip until you had finished putting the car into shipshape condition?

A. No.

Q. Was it only when you had put the car in shipshape for a moment's call to go out again that you were through with your work and authorized to leave the car and go to your home?

A. That is right.

Q. What are the facts as to whether you as private cook were subject to 24-hour call for a trip at any moment?

A. Yes, sir, at any moment.

Q. Is the same thing true as to I. D. Walton?

A. Yes, sir, his work had to be done.

Q. Please fix your mind on the date of March 30, 1949. I will ask you if a day or two, or some few days prior to that date you had made a trip as private cook on the general [fol. 49] manager's private car on the Missouri Pacific Lines? Had you made a trip somewhere?

A. Yes, sir.

Q. Who was the general manager at that time?

A. Mr. A. B. Kelley.

Q. And where had this trip been made to?

A. To Harlingen, Texas.

Q. Do you know when you went down there, as best you can remember?

A. Oh, about—we stayed out about three days. I don't know just when we went, but we stayed gone about three days.

Q. After you had been down to Harlingen did you return to Houston?

A. Yes, sir.

Q. When you made the trip to Harlingen was the private car attached to a passenger train?

A. Yes, sir.

Q. When you made the return trip from Harlingen to Houston was the private car attached to a passenger train?

A. Yes, sir.

Q. Do you recall the date that the car and the train you were attached to came back into Houston?

A. March 30, 1949.

Q. Parris, do you recall the approximate hour that the train arrived back into Houston?

A. I don't know exactly the hour, but it was late. I don't know how many minutes late, but it was a little late.

Q. When your train arrived into the station had you already served a meal for them?

A. Yes, sir.

Q. What was the last meal you had served?

A. It was lunch, late lunch.

[fol. 50] Q. When you got into the station had you finished cleaning up and putting the car in shipshape after this trip when you first came into the station?

A. No, sir; that is the last thing we do. We had to take the boss's belongings home.

Q. Now, when you made this trip to Harlingen do you recall the personnel, the people on the car?

A. Yes, sir.

Q. Who were they? A. Mr. A. B. Kelley, Mr. Lloyd Sellerman, his secretary, and Mr. Kelley's wife, Mrs. A. B. Kelley, I. D. Walton and myself.

Q. When you got back into the station and the train came to a stop what is the first thing you did then?

A. Well, we got off the car and got the wagon—most of the time we would have to get the wagon instead of the carriage because the red caps would be using the carriages, so we would get a wagon and pull it up on the side of the car where I. D. would hand me the bags and I would put them on the wagon.

Q. In other words, you unloaded the baggage?

A. I. D. unloaded it from the car and I put it on the wagon. After I would put it on the wagon then I would go across to the Ben Milam Hotel and get the car, then

I would come back, and I. D. would pull the wagon to the side gate and load the belongings into the car.

Q. Did you take Mr. and Mrs. Kelley home, or just Mrs. Kelley?

A. Just Mrs. Kelley.

Q. Where was their home?

A. Out on Shakespere, in the vacinity (sic) of Rice Instute (sic).

Q. After you returned from there, did you return with the automobile?

A. Yes, immediately.

[fol. 51] Q. To the Ben Milam Hotel?

A. Yes, sir, and I put the car up.

Q. Then did you return to the railroad station and the general manager's private car?

A. Yes, sir.

Q. Was that the normal and usual and customary procedure that you always followed in coming in from your run?

A. Yes, sir. I would go a lot of times, when the boss's wife wouldn't go. I would take the bags anyway.

Q. Take them to his home?

A. Yes, sir.

Q. Now, tell the jury, after you got back into the private car what duties you started to perform on March 30, 1949?

A. Well, when I got back on the car I started right away to get my pots out of the sink. I washed my pots and as I got through washing the pots and put them on the sink to drain I went into the compartment to get some towels, in which we keep our supply of towels, in order to dry my pots.

Q. Is that a usual and proper thing you were supposed to do?

A. Yes, sir, to finish my work.

Q. When you left the station to take the general manager's wife, Mrs. A. B. Kelley, to her home, where was the general manager's private car placed on the track, do you recall?

A. It was placed just where I left it.

Q. I say, when you left to take her to her home do you recall where the car was? If you don't say so.

A. It was put on track No. 2.

Q. Track No. 2?

A. About.

Q. When you returned was the general manager's private car in the same position, or at the same place where it had been when you left?

[fol. 52] A. Yes, sir.

Q. I believe you stated that in fulfilling your duties there you had washed your pots and pans and gone into the little adjoining compartment to get some dish towels, is that correct?

A. Yes, sir.

Q. Now, tell the jury while you were in the compartment getting the dish towels if anything unusual happened.

A. When I was in the compartment getting the dish towels, well just as I turned around to come out a terrific crash came and threw me against the shower bath, the edge of the shower, which threw my head through the hole of the shower bath and between my shoulder and neck took the blow.

Q. That was your left shoulder or right one?

A. My left shoulder.

Q. As I understand there came a crash and it threw your head through the opening, for the door opening of the shower bath?

A. Yes, sir, the opening of the shower.

Q. Then your left shoulder hit the edge of the facing of the opening of the door?

A. Yes, sir.

Q. Before that shock or jolt came, and after you had gotten back on the private car, had it started to move? I mean by that was the car in the process of being moved around on the switch tracks while you were washing your pots and pans?

A. Yes, sir.

Q. And just prior to the sudden crash or jolt that you described had the car been in motion by the switch engine?

A. Yes, sir.

Q. That is the car you were on?

[fol. 53] A. Yes, sir.

Q. Now, when the sudden crash came, Parris, and you

were thrown against this shower door, hitting your left shoulder there, was that the normal and usual way that you had known and experienced in working for the railroad for this private car to be pushed up against anything, or was that unusual or abnormal?

A. It was absolutely abnormal. I never had had a jolt like that before in my life.

Q. Now, tell the jury what the situation was with your shoulder when it was hit there. Did it pain you, or hurt you, or what?

A. Well, when it hit me there I crouched down to the floor on my knees, and I set down there for a while. Then I got up. It hurt me very bad and I had to hold it.

Q. After you got up what did you do?

A. I went out of the kitchen into the dining room looking for my partner. He was usually out there checking linen and counting the linen.

Q. Was I Dee there when you went out?

A. When I went into the dining room I didn't see I Dee, I thought perhaps he was dead. I didn't see him or hear him at that time.

Q. Then where did you go?

A. I walked to the back end of the car, to the door of the observation and I saw I Dee there talking to the switchman.

Q. Talking to the switchman?

A. Yes, sir.

Q. Did you hear I Dee say anything to the switchman?

A. Yes, sir.

Q. What did he say to the switchman at that time?

Mr. Arterbury: I object to what I Dee Walton may have said to the switchman.

[fol. 54] The Court: I sustain the objection. I Dee Walton is not a party to this suit.

Mr. Smith: No, sir, but he is a witness.

The Court: I sustain the objection.

Mr. Smith: I am offering it on the idea that a statement made by a person out there is res gestae. (sic) even though he is not a party.

The Court: I do not agree with you on that.

Mr. Smith: May we have our exception?
The Court: Sure.

Q. When the general manager is off the car who is the boss, or in charge of the car?

A. The porter, I Dee Walton.

Q. After you had gone there and seen I Dee Walton talking to the switchman, or saying something to the switchman or flagman, whoever it was, state whether or not at that time, immediately after you had sustained a crash and to the end of the car, if you heard the flagman or switchman, whichever one it was, make any statement there at the scene of the crash you had, concerning the happening of the crash?

A. I did.

Q. Now will you tell the Court and jury what you heard the switchman or flagman say?

A. Well, the flagman told him that he had to report that, and the switchman told him that he give the engineer a stop sign but he didn't stop.

Q. In other words, as I understand it then, it was the flagman or switchman that said that?

A. The flagman.

Q. He said he had given the engineer orders to stop but that he didn't stop?

A. Din't (sic) stop, he don't know why.

Q. Then what is the next thing you did?

[fol. 55] A. I immediately went upstairs and reported to Mr. Kelley the happening.

Q. That is your boss man?

A. Yes, sir, Mr. A. B. Kelley.

Q. What instructions did Mr. Kelley give you at that time?

A. He told me to go to the doctor; for me to go out and get an order from Mr. Roemer, the Chief Clerk.

Q. Was Mr. Kelley in the Union Station at that time?

A. Yes, sir, in his office.

Q. Was Mr. Roemer in his office?

A. Yes.

Q. Did you get an order to go to the doctor from Mr. Roemer?

A. Yes, sir.

Q. Did you go to the doctor?
A. Yes, sir, I did.
Q. That same day you were hurt?
A. Yes, sir.
Q. What doctor or clinic did you go to?
A. I went to the Houston Clinic.

* * * * * * *

[fol. 68] Cross examination.

Questions by Mr. Arterbury:

* * * * * * *

[fol. 74] Q. Now, Parris, you have told us about the switch engine coming in and connecting up with this car and moving it over to a side track, that is what they were doing with it?

A. Yes, sir.

Q. They were moving it from the position where it was left when you came into the station, over to one of the side tracks next to the fence, there by Texas Avenue?

A. Yes, sir.

Q. And only you and Idee Walton were on the car at the time this happened?

A. Yes, sir.

Q. You say he was the porter in charge of the car, and you were the cook in charge of the kitchen?

A. Yes, sir.

Q. Isn't it a fact, Parris, that you had long since finished lunch, finished your pots and pans, and dishes, and that when you came back you went back to the car and as it was being moved over the track you were in your dressing room putting on your—changing clothes and getting ready to leave the car and go home?

A. No, sir, because neither one of us had finished our [fol. 75] work. Idee was counting linen at the time the accident happened.

* * * * * * *

[fol. 80] Q. In the meantime, along about March 21, 1952, you went to your lawyer and you decided to file suit, didn't you?

A. Yes, sir.

Q. And you didn't file suit against the Houston Belt & Terminal Railroad Company, the one you said was responsible for your injury, did you?

A. No, sir, I did not.

[fol. 81] Q. And the reason you didn't file against them, you knew that your cause of action, your suit, was barred by the two-year statute of limitation?

A. Yes, sir.

Q. You knew that?

A. Yes.

Q. And your lawyer confirmed that?

A. Yes.

Q. And so then you decided you would sue your own Company, the Company you were working for?

A. Yes.

Q. Since you couldn't sue the Houston Belt & Terminal Railroad Company direct, your lawyer told you that you would take a chance and see what you could do by suing your own Company?

A. Yes, sir.

Q. And that is what you did?

A. Yes, sir.

Q. And that is why you are here today?

A. I Don't (sic) understand.

Q. I say that is why you are here today, you decided on that course of action.

A. I still don't understand what you mean.

Q. Well, I say the reason you didn't sue the Houston Belt & Terminal Railroad Company was because you knew your cause of action against them was barred by the two-year statute of limitation, so your lawyer told you it was too late to sue them, didn't he?

A. Well, I don't know the technical part of the case, as to the two years. Mr. A. B. Kelley told me that three years was the statute of limitation.

Q. You remember you told me before that you were the one that figured that out. You knew you were barred by the two-year statute of limitation. You went to Mr. Robert Kelley and he told you that was right, you would have [fol. 82] to sue your own Company.

A. I don't know the technical part of it. I asked Mr. A. B. Kelley; I was still worried about having misery in my shoulder. My doctor told me to go back to work and I would get better, and I am not getting better. I wanted to know what to do before the statute of limitation come in. Mr. A. B. Kelley went out of his office and he come back and said——

Mr. Arterbury: I object to him stating that.

The Court: He has a right to explain.

A. (Continuing) He told me that—they have a lawyer, and he went out of the office and when he come back he told me three years was the statute of limitation. I thought two years was the statute of limitation, and he said, "That is all right." Mr. A. B. Kelley, my boss, told me that.

Q. You have testified twice before in this case, haven't you?

A. Yes, sir.

Q. This is the first time you have mentioned that fact.

A. Well, things happen so far back you can't hardly remember everything.

Q. This is further away from the accident than the other two times you testified?

A. Yes, sir, but you can refresh your memory.

Q. The first time you testified in this case you told us the reason you didn't sue the Houston Belt & Terminal Railroad Company, as you said a while ago, was that it was barred by the two year statute of limitation?

A. I don't know the technical part of the statute of limitation, but I did know about the two years limitation, and I talked to Mr. A. B. Kelley, and he told me three years was the statute of limitation, so I waited thinking I was going to get better. I didn't want to sue nobody. I wanted [fol. 83] my job as long as I was able to do it.

Q. How does it happen that this is the first time you have ever offered that explanation? Twice before you told us simply and clearly that the reason you didn't sue the Houston Belt and Railroad Company was because you knew you were barred by the two years statute of limitation. What has happened since the other trials that you explain that differently now?

A. My memory.

Q. You didn't think anything about that the first time you testified?

A. I didn't remember at the trial, but he told me.

Q. You didn't think anything about that the second time you testified?

A. I didn't remember that, no, sir.

Q. Is it barely possible that anybody has been talking to you since the last time you testified?

A. No, sir, that is absolutely my own.

Q. It is a fact that Mr. R. H. Kelley told you that you were too late to sue the Houston Belt & Terminal, and your only chance was to sue your own Company and see what would happen?

A. Since I had waited so long that was the suit to take.

Q. Since you had waited so long that was your only chance?

A. Yes, sir.

Q. So that is why you are here today?

A. I am here because Mr. A. B. Kelley told me the statute of limitation was three years.

Q. You mean Mr. Bob Kelley told you?

A. No, sir, Mr. A. B. Kelley, my boss, told me.

Q. I am talking about Mr. Bob Kelley, the lawyer.

A. He told me since I waited so long that was the only thing for me to do.

Q. That is right.

[fol. 84] A. I didn't want to sue the Company or anybody; that is why I waited so long. I went back to work crippled and worked two years that way, and I would be working today if I was able.

Q. You worked two years after you sued the company?

A. A little over a year.

* * * * * * *

[fol. 100] Redirect examination.

Questions by Mr. Smith:

* * * * * * *

[fol. 101] Q. I believe you stated that you ultimately conferred with Mr. Bob Kelley, the senior member of the firm of Kelley and Ryan, about your lawsuit?

[fol. 102] A. Yes, sir.

Q. Had you known Mr. Kelley before that?

A. No, sir.

Q. I mean before that time, you had see (sic) Mr. Bob Kelley?

A. I had seen him, but I didn't know him personally.

Q. Where had you seen him before you went to him, to consult with him?

A. Well, he was a guest of Mr. A. B. Kelley several times attending to business.

Q. Of the railroad?

A. Yes, sir.

Q. Thwn (sic) you went to see him because you had learned he had been a guest of Mr. A. B. Kelley on the private car?

A. Yes, sir.

Q. And that he was a lawyer?

A. Yes, sir.

Q. When you went to see him I believe Mr. Arterbury brought out that he advised you that you could not make a suit against the Houston Belt & Terminal Railroad Company?

A. Yes, sir.

Q. Because of the technical reason that the two years statute of limitation had run?

A. Yes, sir.

Q. But that you should proceed under the Federal Employers Liability Act?

A. That is right.

Q. Passed by the Federal Congress?

A. Yes.

Q. Against your own Company, is that right?

A. Yes, sir.

Q. Now, at the time you went to see him was it not along in March of 1952?

A. Yes, sir.

Q. Your first accident occurred on the 30th day of March, [fol. 103] 1949, did it not?

A. Yes, sir.

Q. Now, do you know the approximate date that your suit was filed under the Federal Employers Liability Act for the first accident?

A. I don't know exactly, no.

Q. To refresh your memory I will ask you if it wasn't around March 21, 1952?

A. About then, yes.

Q. Now, is it not a fact that on March 30, 1952, that three years would have run from the day you were hurt in 1949?

A. Yes, sir.

Q. Did Mr. Bob Kelley advise you that you had to file suit at that time on March 21, 1952, to prevent limitation running against you on March 30, 1952, if you wanted to preserve your rights that you had at that time?

A. Yes, sir.

Q. And is that the reason you filed it?

A. Yes, sir.

Q. Even though you were still working?

A. Yes, sir, even though I was still working, I didn't want to.

Q. Isn't it true that you were advised if you didn't get that suit filed before March 21, 1952, that any claim you might have against your employer would be barred by the three years statute of limitation?

A. Yes, sir.

* * * * * * *

[fol. 105]

R. T. CHAMBERS, called as a witness by the plaintiff, having been duly sworn, in response to questions propounded to him, testified as follows:

Direct examination.

Questions by Mr. Ryan:

Q. State your name.

A. R. T. Chambers.

Q. Where do you work?

A. I am auditor of the Houston Belt & Terminal Company.

Q. How long have you been auditor for the Houston Belt & Terminal Railroad?

A. Since June, 1950.

Q. What did you do before that?

A. I was chief clerk in the accounting department from May 1920 up to June 1950.

Q. Is that in the same office where you now work?

A. Yes, sir.

Q. What did you do before 1920?

A. I was a clerk in the accounting department from October 1913. I started to work for the Houston Belt & Terminal Railroad Company in October of 1912, and transferred to the accounting department in October, 1913, and I was there all the time except through the period of Federal control.

Q. That was during the first world war?

A. Yes, sir.

Q. Then you have worked substantially all of your working life for the Houston Belt & Terminal Railroad Company?

A. Yes, sir.

Q. In the accounting or auditing department?

A. Yes, sir.

Q. You are now auditor?

A. Yes, sir.

Q. Is the auditor at the Houston Belt & Terminal the offi- [fol. 106] cer that ordinarily has custody of the records of the Company?

A. Of the accounting records, yes.

Q. Do you also have custody of the contracts and agreements relating to the work of the Houston Belt and Terminal and its relationship with its member lines?

A. Yes, sir, we have the contracts. The master contracts are on file with the Secretary of the Company, but I do have copies of all of the contracts.

Q. Could you tell us briefly what the Houston Belt and Terminal Railroad Company is?

A. It is a switching terminal company for its tenant lines. It is a switching company for itself. That is, it switches cars under its own switching tariffs approved by the I.C.C. and the Railroad Commission of Texas. We perform a terminal service in some instances for the tenant companies, a switching service for ourselves, and we have contracts providing for the service we render.

Q. Who are the tenants or proprietary lines?

A. The Fort Worth & Denver; Chicago, Rock Island & Pacific; Santa Fe; Beaumont, Sour Lake & Western; St. Louis, Brownsville & Mexico.

Q. The last two mentioned lines, the Beaumont, Sour Lake & Western, and the St. Louis, Brownsville & Mexico, are parts of what is called the Missouri Pacific Lines?

A. Yes. Those are proprietary lines. The I-GN is a user line under the present contract.

Q. As to the Missouri Pacific Lines, in fact it is Mr. Guy A. Thompson, he has been the Trustee operating the properties?

A. Yes, sir.

Q. You refer to the Missouri Pacific Lines as proprietary lines. What do you mean?

[fol. 107] A. Well, they own some of the stock. They own fifty per cent of the capital stock of the Houston Belt & Terminal Railroad Company.

Q. Do they own it in equal portions?

A. Yes, sir, 25 per cent.

Q. Then the other fifty per cent would be owned by the other proprietary lines?

A. Yes, sir, the Rock Island 12½ per cent, and the Fort Worth & Denver 12½ per cent, and the Santa Fe 25 per cent.

Q. Now, has that existed for many years?

A. From the beginning.

Q. When did the Terminal Company begin operations?

A. January, 1908.

Q. You have referred to the performance of Houston Belt & Terminal of certain functions for the proprietary lines, or certain service for the proprietary lines. You mentioned tariffs, can you tell us whether or not the Houston Belt & Terminal has any published tariffs covering the performance of service for its proprietary lines?

A. No, sir.

Q. You are certain it does not?

A. It does not.

Q. The tariff which it had published approved by the I.C.C. and the Railroad Commission of Texas covered the performance of service for other railroads?

A. Yes, sir, for other railroads, and it is not service in the terminal, but it is what we call inter-terminal, meaning

moving traffic from one place to other places on its own lines.

Q. That would be a movement performed for some industry, other than for some railroad?

A. Yes, sir.

[fol. 108] Q. Now, does the income of the Houston Belt & Terminal from the performance of these various switching services under those tariffs ever equal its expenses?

A. No, sir.

Q. Is there always a deficit from those operations?

A. Yes, sir.

Q. How is that deficit made up?

A. The lines are charged.

Q. Which lines are you referring to?

A. All of the using lines. All of the tenant lines, proprietary or using lines. All of the lines that use the tariff of Houston Belt & Terminal are charged with their portion of the expense each month on the basis of per cent, usually based on use. The revenues collected by the Terminal Company are allocated to the lines on an agreed use basis. Therefore the net amount of the operating expenses are charged against the lines at the end of each month to what we call our joint facility bill.

Q. Is that done, roughly speaking, in proportion to the extent of the use of the proprietary lines make of the facilities?

A. Yes, sir.

Q. Is it based largely on the number of cars that each company moves into and out of the terminal during the month?

A. Generally. We have variations from that basis. We have cars moved by switch engines, cars moving through the various zones.

Q. Generally speaking, you determine how many cars each company had moving through the facility during the month, then on some agreed basis you compute how much each one owes on the operating expense?

A. Yes, sir.

[fol. 109] Q. Was that same arrangement in effect back in March, 1949?

A. Yes, with one exception. The I-GN at that time was using only the passenger facilities of the Houston Belt & Terminal Company, and that was on a six cent cost per car.

Q. So that back in 1949 the I-GN, which is not one of the stock holding companies, did not foot its proportion of the bill at the end of the month for the use of the terminal facilities?

A. That is right.

Q. Is it correct that in 1949 only the proprietary or stock holding companies contributed at the end of each month to the expense of the Houston Belt & Terminal Company?

A. Yes.

Q. And that arrangement has been in effect since they have been in operation?

A. Yes.

Q. Do any of the operating companies, particularly the Missouri Pacific, of which Mr. Thompson is Trustee, have any crews in Houston to switch passenger cars?

A. No, sir.

Q. Did they have any in 1949?

A. No, sir.

Q. Since the beginning of the Houston Belt & Terminal have any of these companies had any switching crews to do passenger car switching?

A. No, sir.

Q. They use Houston Belt & Terminal crews to do their switching all the time?

A. Yes, sir.

Q. I show you a document, which I am sure you have seen, and counsel agree it is a correct copy of what it purports to be. I will ask you if you are familiar with that? [fol. 110] A. Yes, sir.

Q. Can you tell us what that is?

A. It is the operating agreement between the Houston Belt & Terminal Railroad Company and its proprietary companies or tenant lines, entered into on July 1, 1907, which covered the operation of the Terminal Company from January, 1908, until June, 1950.

Q. Up until June, 1950?

A. Yes, sir.

Q. So that was the contract which was in effect between these proprietary lines in March, 1949, is that correct?

A. That is correct, yes, sir.

Mr. Ryan: I would like to have this marked for identification, and I would like to read the title into the record so as to make it clear what we are talking about. I am not offering anything else at this time, but I am just offering it purely for identification purposes now.

(The title page of the document above introduced is as follows: "Agreement between Houston Belt & Terminal Railway Company, of the First Part, Gulf, Colorado & Santa Fe Railway Company, The Trinity & Brazos Valley Railway Company, The St. Louis, Brownsville & Mexico Railway Company, the Beaumont, Sour Lake & Western Railway Company, of the Second Part, and Central Trust Company of New York of the Third Part. Relating to Union Passenger and Freight Stations and other Railroad Facilities at Houston, Texas. Dated July 1, 1907")

Q. Now, this contract provides generally, does it not, for the scheme of allocating expenses of operation among the particular lines you have referred to?
[fol. 111] A. Yes, sir.

OFFER IN EVIDENCE AND OBJECTION THERETO

Mr. Ryan: At this point I would like to offer in evidence Article 3, Section 2, appearing on page 13.

Mr. Hoover: We have a rather lengthy and detailed objection, and I think it would be better if the jury are retired while we consider it.

The Court: Gentlemen of the Jury, step out into the hall.

(At this time the jury retired from the jury box, and proceedings were continued in their absence as follows:)

Mr. Hoover: We object to the introduction of that particular section of the contract for the following reasons: The contract itself, and the particular provision itself is wholly irrelevant and immaterial to any issue to be determined in this case. The contract, while an operating agreement between the Belt and the proprietary lines, can form no basis for any tort liability sought to be imposed in this case. The testimony and the evidence thus far introduced

clearly shows that the Houston Belt & Terminal is a separate and distinct corporation, having stockholders and a Board of Directors, and other officers, and the operation of that corporation is governed by the statutory laws of the State of Texas. The particular provision in this contract—we take the view that it is void in that it contravenes the statutory law of the State of Texas, and seeks to take from the Board of Directors the powers and authorities granted it by its own charter provisions, and the statutory law of the State of Texas. The issue to be determined here is whether the movement of the particular car in question by the switching crew of the Houston Belt & Terminal Company was under the supervision and control of any one [fol. 112] or more of these defendants, as to the details and manner in which the switching move was performed.

The Court: I overrule the objection.

Mr. Hoover: Note our exception.

(At this time the jury returned to the jury box and the trial proceeded.)

Mr. Ryan: At this time I would like to read in evidence Article 3, Section 2, of Plaintiff's Exhibit No. 13.

(The section of the contract above introduced is as follows:)

"Section 2: If any officer or employee of the Terminal Company shall be deemed by any of the railway companies to be incompetent, negligent, or guilty of unfairness or discrimination, or otherwise unfit for the performance of his duties, such railway company or companies may deliver to the Terminal Company a written demand for the removal of such officer or employee, and thereupon the Terminal Company shall dismiss such officer or employee within the time mentioned in such demand."

By Mr. Ryan:

Q. Now, Mr. Chambers, I believe you testified before recess that this contract dated July 1, 1907, plaintiff's exhibit No. 13, was the only one in effect in March, 1949?

A. Yes, sir.

Q. And up until May 31, 1950, is that correct?

A. Yes, sir.

Q. And it had been in effect for some 40 years prior to that?

A. Yes, sir.

Q. And the arrangement under which the Houston Belt & Terminal did the switching for the proprietary lines have been substantially the same for 40 years?

[fol. 113] A. Yes, sir.

Q. Now, about June 1, 1950, a new contract between the Belt and the proprietary lines went into effect, did it not?

A. Yes, sir.

Q. I will show you this document and I will ask you if you recognize that as a copy of the agreement that went into effect on June 1, 1950?

A. Yes, that is a copy of the agreement.

OFFERS IN EVIDENCE

Mr. Ryan: At this point I would like to have this agreement marked for identification, and read for identification purposes only the cover page of it.

(The document above introduced was received in evidence and marked as plaintiff's exhibit No. 14, and the title page of the document reads as follows:)

"1948 H. B. & T. Operating Agreement. Agreement between Houston Belt & Terminal Railway Company, Chicago, Rock Island & Pacific Railway Company, Fort Worth & Denver City Railway Company, Gulf, Colorado & Santa Fe Railway Company, Burlington, Rock Island Railroad Company, and Guy A. Thompson as Trustee of the properties of The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville & Mexico Railway Company, International Great Northern Railroad Company, and Sugarland Railway Company. Dated as of November 15, 1948."

By Mr. Ryan:

Q. Now, Mr. Chambers, I will show you another rather heavy document I have here, and I will ask you whether or not you recognize or can identify that?

A. Yes, that was the application to the Interstate Commerce Commission by The Houston Belt & Terminal Company and these various railroads for authority to enter into this 1948 operating agreement, which became effective [fol. 114] June 1, 1950.

Q. And I understand the large white document is the application that the Houston Belt & Terminal Railroad Company and these other railroads made to the Interstate Commerce Commission for authority to adopt this contract, plaintiff's exhibit No. 14, which went into effect on June 1, 1950, is that right?

A. Yes, sir.

Mr. Ryan: At this time I would like to have this document marked for identification and then read the cover page.

(The document above introduced was received in evidence and marked as plaintiff's exhibit No. 15, and the title page reads as follows:)

"Before the Interstate Commerce Commission. Finance Docket No. 16592. Application of Houston Belt & Terminal Railway Company; Gulf, Colorado & Santa Fe Railway Company, Fort Worth & Denver City Railway Company; Chicago, Rock Island & Pacific Railroad Company, Guy A. Thompson, Trustee; The Beaumont, Sour Lake & Western Railway Company, Debtor, Guy A. Thompson, Trustee; The St. Louis, Brownsville & Mexico Railway Company, Debtor, Guy A. Thompson, Trustee, International Great Northern Railroad Company, Debtor, and Guy ... Thompson, Trustee, Sugarland Railway Company, Debtor, for authority to consummate all the transactions requiring authorizations incident to the enlargement and operation of Terminal Facilities of the Houston Belt & Terminal Railway Company at Houston, Texas."

The Court: Is the record clear that the document is not in the record as a whole?

Mr. Ryan: Yes, sir. I am not offering the entire document. It is too bulky to be of any use here, and I will offer certain portions later.

[fol. 115] By Mr. Ryan:

Q. Mr. Chambers, I hand you a mimeographed instrument, and I will ask you whether you recognize that as a certified copy, certified by the Secretary of the Interstate Commerce Commission of the Commission's opinion and order with respect to this application which has been identified as plaintiff's exhibit No. 15, for authority to enter into this contract which has been identified as plaintiff's exhibit No. 14?

A. Yes, sir, that is the approval by the Commission of the application.

Mr. Ryan: I would like to have this document marked in the same way, for identification, then I would like to read the heading of it for identification purposes only.

(The document above introduced was received in evidence, marked as plaintiff's exhibit No. 16, and the heading of this document reads as follows:)

"Interstate Commerce Commisison. Finance Docket No. 16592. Houston Belt & Terminal Railway Company Control, etc. Submitted February 6, 1950. Decided March 7, 1950."

Mr. Ryan: At this point I propose to offer certain provisions in each of these documents and I will call them to Mr. Hoover's attention. I propose to offer from page five of the document identified as plaintiff's exhibit No. 14 which is labeled "1948 HB&T Operating Agreement" under paragraph 8 on page five, beginning with the third paragraph with the word "Beaumont" and ending with the word "Lines".

(The portion of the document introduced reads as follows:)

"Beaumont, Brownsville, I-GN, Sugarland, Denver, Rock Island and Santa Fe, are herinafter sometimes called [fol. 116] using lines".

Mr. Ryan: Then on page 8 of the same document at the bottom of the page, the sentence which is in italics immediately following the words "Section i.l." This sent-

ence begins with the word "admission" and ends with the word "advances".

The portion of the document read at this time is as follows: "Section 1.1. Admission of I-GN and Sugarland to joint use and of Denver and Rock Island to joint control and use of Belt; effective date and stock ownership percentage defined; Denver and Rock Island advances."

Mr. Ryan: Then on page 29 of the same document the first paragraph at the top of the page beginning with the word "all", and ending with the word "law".

(The portion of the document read at this time is as follows:)

"All services performed by Belt for account of the using lines shall be performed by Belt as agent for the using lines, and under their respective tariffs to the extent tariffs covering the performance of such services are required by law."

Mr. Ryan: Now, with respect to the document identified as plaintiff's exhibit No. 15, which the witness Chambers has identified as the application made to the Interstate Commerce Commission, I would like to offer in evidence at this point page 64 of the application, the entire page, with all of the printing that appears on that page.

(The page of the document just offered is as follows:)

"State of Missouri, County of St. Louis: SS

Guy A. Thompson, being first duly sworn, on oath says [fol. 117] that as Trustee of the Beaumont, Sour Lake & Western Railway, The St. Louis, Brownsville & Mexico Railway Company, International Great Northern Railroad Company, and Sugarland Railway Company, Debtors, each is an applicant in the foregoing application; that he has knowledge of the matters and things set forth in the foregoing application with respect to said debtor applicants; that to the best of his knowledge and belief, such matters and things are true and correctly stated; and that he is duly authorized by the United States District Court for the Eastern Division, Eastern Judicial District of Mis-

souri, the Court having jurisdiction of the Trust Estate of said Debtors, to make, verify and file this application.

/s/ Guy A. Thompson

Subscribed and sworn to before me, a Notary Public in and for the State and City above named, this 31st day of May, 1949.

/s/ Walt W. Haverfield
Notary Public

(Seal)

My commission expires September 15, 1952."

Mr. Ryan: Then on page 19 of this same document I would like to offer in evidence the fifth paragraph under Section "b" subsection 8, beginning with the words "The Beaumont" and ending with the word "BRI". And on that same page, 19, of the same document I would like to offer in evidence the first sentence of the paragraph immediately following the paragraph last referred to and beginning with the words "The Brownsville" and ending with "BRI".

(The portions of this page introduced in evidence above are as follows:)

"The Beaumont jointly controls the Belt together with [fol. 118] the Santa Fe, Beaumont and BRI."

Mr. Ryan: Then on page 18 of the same document I would like to offer in evidence the first sentence of Section of "b" subsection 7, beginning with the words "The Belt", and ending with "BRI."

(The portion of the document introduced at this time is as follows:)

"The Belt is controlled through stock ownership by the Santa Fe, Beaumont, Brownsville and BRI."

Mr. Ryan: Then with respect to the document which has been identified as plaintiff's exhibit No. 16, being the opinion and order of the Interstate Commerce Commission, I would like to offer from sheet 4 of that opinion the first complete paragraph on that page, beginning with the

words "following the organization", and ending with the words "September 29, 1921."

Mr. Hoover: If the Court please the defendant objects to the introduction in evidence of the indicated portion of plaintiffs' exhibit, first, for the reason that it appears that said contract did not become effective until 1950, which is long after the date of the accident of March 30, 1949, involved in this litigation. Second, that this appears to be a private agreement between the parties themselves, some of whom are not parties to this litigation, which private agreement of the parties could not in any way affect the duties and obligations imposed upon the corporations under their charter powers as railroad corporations. Third, that the language used in the designated excerpts are conclusions of the parties and conclusions of law and not of fact, and is not evidence on any issue that may be submitted to the jury in this matter. Fourth, that the terminology used and the designation of the parties in such [fol. 119] excerpts offered may be conclusions of law and cannot determine the legal relationship existing between the parties themselves. Fifth, the excerpts and the provisions of the particular excerpts show upon their face to be agreements between the parties, such agreements and the statements of fact contained in such provisions, insofar as this case is concerned, are nothing more than conclusions of the parties which can in no way affect the liability of said parties under the law as to their responsibility, duties and obligations to the general public and the plaintiff in this case.

The defendant objects to the offered excerpts from plaintiff's exhibit No. 15 for each and all of the reasons assigned to the introduction of excerpt from plaintiff's exhibit No. 14, and in particular to the excerpts appearing on pages 18 and 19 of said agreement because they clearly are conclusions of law of the parties themselves, and not based upon facts, and the admission of such excerpts here invades the province of the jury who will be called upon to determine the facts upon which the legal relationship will be predicated.

The defendant objects to the admission of the excerpt appearing on page 64 of plaintiff's exhibit No. 15 for the

reason that the same is clearly a conclusion of Guy A. Thompson, Trustee, and wholly irrelevant and immaterial to any issue in this litigation. Further, that only the Board of Directors of a given corporation, organized under the law, is empowered under the law to determine the policies of management of such corporation, and they cannot delegate such powers.

The defendants object to the introduction of the excerpt [fol. 120] indicated from plaintiff's exhibit No. 16 for each and all of the reasons assigned to the introduction of the excerpts from plaintiff's exhibits 14 and 15, and particularly to that part or parts of said excerpt which are clearly conclusions of the parties and not facts, and is an attempt by the parties to designate the legal relationships, which is a matter to be passed upon by the Court. That what the parties designate themselves does not determine the legal relationship which the Court may find from facts as it may appear in this case.

All of the excerpts in the three exhibits tend to invade the province of the jury, and are highly prejudicial to the rights of the defendants in this cause.

The defendants further object to each and every item in the three exhibits as an attempt to establish by contract legal relationships between the parties themselves, which can constitute no basis for any liability of the defendants in this cause to the plaintiffs. That the statements, being largely conclusions, are therefore incompetent, and can have no probative force. I believe that will take care of the exception.

The Court: I overrule the objection.

Mr. Hoover: Note our exception.

(The portion of plaintiff's exhibit No. 16 which was introduced and read, is as follows:)

"Following the organization of the Belt in 1905, that carrier acquired the railroad and terminal facilities in Houston of the Santa Fe under a 99-year lease, purchased other property, and constructed a passenger station and certain additional freight terminal facilities. The operation [fol. 121] of these facilities was begun by the Belt on January 1, 1908. Since that time it has provided the pro-

prietary companies with all their necessary terminal facilities in Houston, including terminal freight train yeards (sic) and mechanical facilities. The Belt performs for such proprietary companies all of their terminal work, including the mechanical work, and the switching involved in the breaking up or the assembling of their trains. It also handles their cars in interchange with other carriers to and from the industries located on Belt's lines, and performs all other switching, including intra and inter terminal switching under its own published switching charges. Such service at present is performed by the Belt for the proprietary carriers as their agent under an agreement dated July 1, 1907, as amended, which expires on January 1, 2007. The 1948 operating agreement is to be in substitution of the 1907 agreement. The International was admitted to the use of the passenger station facilities of the Belt by an agreement dated September 29, 1921."

By Mr. Ryan:

Q. Now, Mr. Chambers, when in the portions of the exhibits I have read, the word "Belt", that refers to the Houston Belt & Terminal Railroad Company?

A. Yes, sir.

Q. And when it reads "Brownsville" here that refers to the St. Louis, Brownsville & Mexico Trustee?

A. Yes, sir.

Q. And when "Beaumont" is used, that refers to the Beaumont, Sour Lake & Western Trustee, does it not?

A. Yes, sir.

Q. Now, Mr. Chambers, this contract, plaintiff's exhibit No. 14, is labeled "1948 Houston Belt & Terminal operating agreement", isn't that right? And it bears the legend [fol. 122] at the bottom. "Dated as of 15th November, 1948."

A. Yes, sir.

Q. But you have testified, and as the record shows, it did not go into effect until as of June 1, 1950, is that right?

A. Yes, sir.

Q. Do you know whether or not it was under discussion and negotiations during the several years preceding 1950?

A. Oh, yes, for several years the Directors were working out the contract and agreement.

Q. But it had actually been put into form for submission to the Interstate Commerce Commission approximately as of November 15, 1948, had it not?

A. Yes, sir.

Q. Now, during 1948 and 1949, and the early part of 1950, the process of getting this thing agreed upon and submitted to the Commission to approve was going on pretty continuously, was it not?

A. Yes, sir, and of course it also depended upon the construction of the facilities that were to be taken in under this agreement.

Q. There were some new facilities being built to be taken into this agreement?

A. Yes, sir, the Settegast Yard.

Q. What date does this application bear?

A. May 23, 1949.

Q. That is the date it was printed up in this form?

A. Yes, sir.

Q. During the year 1949, and particularly in March, 1949, insofar as you know, was the arrangement that the Belt had for performing the switching work of the proprietary lines substantially the same, so far as the operation is concerned, as the arrangement they have now?

[fol. 123] A. Substantially, yes.

Cross examination.

Questions by Mr. Hoover:

Q. Do you know exactly when the Houston Belt & Terminal Railroad Company was organized, or when the charter for it was granted?

A. In 1905, I believe, was the organization.

Q. Do you have any records under your control or in your office to show who the original incorporators were?

A. Yes, sir, they are shown in the charter granted by the State of Texas.

Q. Do you have them there?

A. Yes, sir.

Q. Would you mind reading them?

A. Sam LaFrance, John Summierfield, Delbert Fannin, L. W. Mildock, John G. Logue, D. H. Hurley, Hyman Levy, B. F. Bonner, J. M. Rockwell, and H. N. Tinker.

Q. That was the charter granted by the State of Texas?

A. Yes, sir.

Q. Do you have who the original subscribing stockholders of the Belt were?

A. You mean the railroads?

Q. Yes.

A. Yes, The trinity (sic) & Brazos Valley Railway Company, Gulf, Colorado & Santa Fe Railroad Company, Beaumont, Sour Lake and Western Railway Company, and the St. Louis, Brownsville & Mexico Railway Company.

Q. What percentage of the stock was held by each of the subscribing companies in the Houston Belt & Terminal Railroad Company?

A. Each line had 25 per cent of the capital stock.

Q. Was that the same stock interest as it existed on March 30, 1949?

A. Yes, with the exception that the Trinity & Brazos [fol. 124] Valley Railway interest had been—had at that time passed into the Burlington, Rock Island Railroad. With that exception it was the same.

Q. As of March 30, 1949, do you know who composed the Board of Directors of the Houston Belt & Terminal Railroad Company?

A. Yes, sir. D. C. Haggart and R. Wright Armstrong——

Q. With what company?

A. Burlington, Rock Island. J. B. Paul and J. F. Cowley of the Santa Fe. F. E. Bates and R. H. Kelley of the Beaumont, Sour Lake & Western. C. A. Ryan and A. B. Kelley for the St. Louis, Brownsville & Mexico.

Q. Now, as of March 30, 1949, do you have who the officers of the corporation were?

A. Yes, sir. J. B. Paul was president, F. E. Bates and D. C. Haggart, vice presidents, and A. F. Midland was secretary and treasurer. The general attorneys were Kelley, Mosheim and Ryan. L. M. Barrington was auditor and G. M. Leach was acting general manager. C. C. Luckle was industrial land and tax commissioner; C. S. Kirkpatrick was chief engineer.

Q. Now, immediately after the incormporation (sic) of the Houston Belt & Terminal Railroad Company what arrangements were made or what was done in connection with the financing of the operation, if you know?

A. The proprietary companies advanced money to the Terminal Company to acquire certain rights of way and station grounds, and commenced construction of the yards and facilities, and when sufficient money had been expended by the Belt the Railroad Commission approved the issuance of first mortgage bonds. The Terminal Company had been authorized to issue five million dollars of first mortgage bonds to do all of the things that were contemplated under the agreement it had made with the lines. As these [fol. 125] bonds were sold the money was repaid to the lines, and the money from the additional bond sales as we went along, up to five million dollars, was used in the building of the various facilities, station buildings, passenger and freight yards, tracks, etc.

Q. Was it from that money derived from the bond issue that the Union Station facilities were acquired?

A. Yes, sir.

Q. And the Belt at the present time then owns the passenger facilities at the Union Station?

A. Yes, sir.

Q. Those were bonds issued by the Houston Belt & Terminal Railroad Company?

A. Yes, sir.

Q. Were they sold to the general public as such?

A. Yes, sir.

Q. Was there some arrangement made between the Belt and the Gulf, Colorado & Santa Fe with reference to certain facilities here in Houston?

A. Yes, sir. The Santa Fe owned certain terminal facilities in Houston, and those facilities were leased to the Houston Belt & Terminal Company for a period of 99 years, beginning July, 1907, and those facilities were used in connection with the facilities they had to construct under this bond issue, and it was all operated as a complete terminal.

Q. Does the Houston Belt & Terminal Company purchase or acquire its own equipment used in its operation?

A. Yes, sir, it buys its own locomotives and such equipment as it needs in the operation of the facilities.

Q. Has it always done so?

A. Yes.

Q. What does that equipment consist of generally?

A. Well, at the present time we have 22 Disel (sic) [fol. 126] switching locomotives; several freight cars that we use, we call them ballast cars that we use around the terminal. Some wrecking equipment and a number of units of automobile trucks and tractors.

Q. Who does the purchasing of all that equipment, the acquisition, one way or the other?

A. Well, the management prepares plans for any particular work it wants to be done. It had to be capitalized, and it is considered new equipment of additions and betterments, and it is referred to the executive officers of the owning companies to indicate their approval of the expenditure, and it is then put into effect and the work is done.

Q. I believe you told Mr. Ryan on direct examination that the Belt operates as a terminal switching carrier, is that right?

A. Yes, sir, terminal and switching.

Q. And it also has its own tariffs which have been approved by the Interstate Commerce Commission, is that right?

A. Yes, and the Texas Railroad Commission switching tariff.

Q. To what type of operation, or what phase of your operation are those tariffs applicable?

A. To the movement of cars to industries located on the Terminal Company tracks. Also, the placement of cars from connecting lines, the T&NO and MK&T to industries on our lines, and the delivery of cars to industries on our lines for road haul movements by T&NO and MK&T.

Q. Then the tariff applies to service to the other railroads rather than the member companies?

A. That is correct. That is what we call our own terminal switching operations.

Q. And the operation of the Belt with respect to its own- [fol. 127] ing or proprietary lines is covered by the contract introduced here?

A. Yes, sir.

Q. Will you explain how the expense of operating the passenger station and the switching of cars at the passenger station are paid?

A. They are paid by the owning or proprietary lines. The operation of the station, of course, is set up each month from the payrolls and other expenses incurred by the Belt in the operation and maintenance and all of the station. The switching operations are set up on the basis of the numer (sic) of switch engine hours that are used in the switching of passenger cars in the station in making up and breaking up trains and the disposition of the cars. The total expense after it has been determined is included in an ordinary operating statement and by bills against the using lines on the basis of the number of cars into and out of the passenger station for each line.

Q. Then from month to month the actual charges submitted to the proprietary lines by the Belt will vary, depending upon the number of cars that use the facilities?

A. That is correct.

Q. Now, on March 30, 1949, what was the situation with respect to the I-GN Railroad?

A. The I-GN was using our passenger station facilities and certain tracks of the Terminal under a contract dated in September, 1921, the effective date of which was July 1, 1920, and they paid to the Houston Belt & Terminal Railroad Company 2.42½ per car for each passenger car into and out of the passenger station.

Q. How was that charge collected from the I-GN?

A. Through an audit bill we prepared and rendered to [fol. 128] them, showing the number of cars in their various trains that came into and left the station during that month and a total number of cars at 2.42½, and determine the amount the I-GN was to pay.

Q. During the entire existence of the Houston Belt and Terminal Railroad Company has it employed and hired its own employees?

A. Yes, sir.

Q. Do the employees of Houston Belt & Terminal Railroad Company have their own labor contract?

A. Yes, sir.

Q. What labor organizations are involved on the Belt?

A. We have the maintenance of way employees, the Brotherhood of Railway Clerks, the Brotherhood of Locomotive Engineers, Brotherhood of Engine Foremen, and several mechanical shop craft units affiliated with the A. F. of L, and we have the Signalmen's union and the Railroad Telegraphers union.

Q. Did you mention the railway clerks?

A. Yes, the Railway Clerks.

Q. Under these labor contracts do the Belt employees have their own seniority rights?

A. Yes, all of these crafts have their own seniority rosters.

Q. Are you familiar with these labor contracts?

A. Yes, in a general way.

Q. Under these contracts does the Belt fire the employees if it sees fit?

A. Yes, it can discharge them. Of course, they are entitle (sic) to an investigation of the thing they are charged with that brings it up. They have the right to representation by their respresentative, (sic) and whatever action taken by the management is done after the usual investigation.

[fol. 129] Q. Then the investigation is made by the management of the Houston Belt & Terminal Company.

A. Yes, sir.

Q. Now, from the recitations you have made earlier the Board of Directors as of March 30, 1949, apparently consisted of eight men, is that right?

A. Yes, sir.

Q. Then the officers were selected by that Board of Directors?

A. Yes, sir.

Q. When Mr. Paul was president——

A. He was vice-president and general manager of the Santa Fe.

Q. Now, then, in the operation of the switching crews—I mean operation of the switch engines, that is done by crews consisting of employees of the Houston Belt & Terminal Company?

A. Yes, sir.

Q. Now, under whose supervision are those employees?

A. They are directly under the supervision of the Yard Master in the zone where they are working.

Q. I believe you told Mr. Ryan there are no other switch engines operating for the proprietary lines in Houston?

A. Only the Houston Belt & Terminal facilities.

Q. Whatever moves were made, were made by the Houston Belt & Terminal crews?

A. Yes, sir.

Q. You say the switch engine crews—how many men are there on those crews?

A. Generally four; a foreman and three helpers. We have two or three shifts where we have only three, but the majority of the crews working have four men in the yard crew, as we call it. The foreman and three helpers.

Q. And the foreman, then, would take his instructions [fol. 130] from the yard master?

A. From the yard master.

Q. Is that yard master employed by the Houston Belt & Terminal?

A. Yes.

Q. Who hires him, generally?

A. Generally the superintendent. He is generally a man promoted from the ranks of the yard crew.

Q. You have been with the Belt for how many years?

A. Forty-three years.

Q. The plaintiff has introduced in evidence Section 2 of Article 3 of this operating agreement with reference to the fact that the railroad companies may demand removal of any employee deemed to be incompetent, negligent, or guilty of unfairness or discrimination. In the years you have been with the Belt has any such demand ever been made upon the Belt for the removal of any employee by any of the participating lines?

A. Not to my knowledge.

Q. Would you normally have known about it if such demand had been made?

A. Well, in my capacity in the accounting department, as chief clerk and auditor during the years I would probably have known about it.

Mr. Hoover: I want to offer, subject to the objections we have made as to the whole contract, I want to offer Section 1 of Article 3 of this operating agreement.

Mr. Ryan: You want to offer it subject to your own objections?

Mr. Hoover: I want to offer it subject to my objection to the whole contract, but I want to offer that section.

Mr. Ryan: We haven't offered the whole contract.

[fol. 131] The Court: He can offer a part of it if he wants to.

Mr. Ryan: May he offer it subject to the objection?

The Court: Yes.

Q. I will ask you to read Section 1 of Article 3 of this operating agreement.

A. "Section 1. The Terminal Company shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal facilities and the use and enjoyment thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply equally and without discrimination to all the railway companies using the Terminal facilities. The railway companies agree to comply and cause their employees to comply with such rules and regulations."

(At this time Court adjournes (sic) until 2:00 o'clock P.M. January 12, 1955, at which time Court reconvened and the cross-examination of Mr. Chambers was continued.)

By Mr. Hoover:

Q. Just before noon I believe you testified in connection with the Belt making certain expenditures for replacements, improvements, or acquisition of equipment and things it needed, and that you presented it to your executives in some form or other?

A. Yes, sir.

Q. Will you explain exactly the procedure you followed in that respect?

A. The management usually determines what the facilities would be, or the cost, and they would submit that to [fol. 132] the executive committee of the Houston Belt & Terminal Company.

Q. Who composed the executive committee of the Houston Belt & Terminal Company?

A. Members of the Board of Directors appointed by the Board to act for them on matters that would come up from time to time, week to week, and month to month.

Q. Then, of course, those same men on the executive committee, or a portion of them, were directors of the Houston Belt & Terminal Railroad Company, and might also be and were officers of the proprietary lines?

A. Yes, sir.

Q. But the proposal was submitted to the executive committee of the Houston Belt & Terminal Railroad Company, and passed to that committee?

A. That is correct.

Q. Before any further action was taken?

A. Before any actual work was done by the management they had to have approval of the committee.

Q. That is the management of the Belt?

A. Yes.

Q. Is that the only approval that was asked by anybody in connection with the operation down there?

A. Yes, sir.

Q. There has been introduced in evidence Section 2 of Article 3 of the operating agreement that was in effect in March of 1949 with respect to the removal of employees of the Belt? I believe you said that so far as you know there has never been any written demand from any proprietary line to dismiss any such employee that you recall?

A. Not as far as I know, no, sir.

Q. Then do you know, or can you tell us, what the pro- [fol. 133] cedure would be if you got a written demand for the removal of one of the employees of a proprietary line?

A. Well, the request would be referred to the Houston Belt & Terminal Company management, and they would call in this employee that had been mentioned in the complaint, or request, for an investigation, and under their contract they are entitled to an investigation when they

have been charged or accused of some wrongdoing, or a violation of the rules.

Q. That is under their labor contract?

A. Yes. They are entitled to representation, by a representative of their choosing, which is generally one of their local chairman (sic). Then if they are found guilty they are discharged, or the management of the Houston Belt & Terminal can discipline them by giving them so many days off, or discharge them, if they think the offense warrants it. That can be appealed to the higher officials of the railroad, on up to the highest officials, and then it can be appealed to the Railway Labor Board.

Q. That was in effect in March, 1949, and for a large part of the time this contract has been in existence?

A. Yes, sir. That manner of handling that sort of thing has been put in there since the passage of the Railway Labor Act.

Q. The action taken by the Belt would be on the merits of the complaint rather than the demand for removal?

Mr. Ryan: We have been letting a lot of this go without objection at the time, but I object now on the ground that the facts the witness has testified to do not form a basis for any such conclusion as Mr. Hoover is trying to get him to draw.

The Court: I overrule the objection.

[fol. 134] Q. Do you know off hand when the Railway Labor Act went into effect?

A. No, I don't know.

Q. It has been a good many years ago?

A. Yes.

Q. Of course, all of the principal labor agreements that you mentioned this morning that the different types of employees have, the operating employees, and clerical employees, all of those agreements were in effect in March of 1949 and prior thereto?

A. Yes, sir.

Q. Does the Houston Belt & Terminal hire its own employees? Is that right?

A. Yes, sir.

Q. And in the event that the Houston Belt & Terminal would discharge an employee for cause, as you have related, would it be the Houston Belt & Terminal who would re-employ that employee, if it were so held by higher authority that he should be re-employed?

A. Re-employed or reinstated.

Q. It would not be one of the proprietary lines?

A. No, sir.

Mr. Hoover: I want to offer in evidence, subject to the objections heretofore made, if there is any question about the whole thing being in, I want to offer a part of plaintiff's exhibit No. 14, which appears on page 39 and is the second paragraph on that page marked "c". It is the first paragraph of subparagraph "c".

Mr. Ryan: I have no objection.

Mr. Hoover: That paragraph reads: "The Belt to manage, control and operate the Terminal and perform certain service. Subject to the provisions of Section 2.5 and 2.7, [fol. 135] Belt shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal and every part thereof, except the mechanical facilities in the new yard. Shall establish rules and regulations governing the operation of trains within and upon the Terminal and the use and enjoyment thereof in all other respects. Provided always that such rules and regulations shall be fair and equitable, and shall apply equally and without discrimination to these lines, and each using line agrees with the other and with the Belt to comply and cause their employees to comply with such rules and regulations."

Mr. Hoover: I also want to offer in evidence certain excerpts from the opinion of the Interstate Commerce Commission which has been marked for identification as plaintiff's exhibit 16, subject to these objections heretofore made. It being the second and third paragraph on page 5 and the two sentences appearing at the bottom of sheet 11, beginning in the fifth line from the top and ending with the word "facilities" in the——

Mr. Ryan: We have no objection, your Honor.

Mr. Hoover: The first excerpt appearing on page 5 of

the opinion of the Interstate Commerce Commission reads as follows:

"Need for expansion of Belt's facilities. Since the Belt first began operation of the Terminal facilities described, the City of Houston has experienced a phenominal (sic) growth. Its population has increased from approximately 170,000 in 1920, about the time it first became a deep water port, to approximately 700,000 at the present time. Co- [fol. 136] existent with this increase in population there was a great increase in the industrial development and in the volume of traffic moving from, to, or via the city. Because of this situation and the operation of longer trains, the freight train yards of the Belt known as its old and new south yards have become inadequate to handle the freight train yard work of the Beaumont, the Brownsville, the Santa Fe and the Burlington, Rock Island. These train yards are located in the southern part of Houston in an area that has developed to such an extent that they cannot be enlarged to an adequate size except at excessive cost. Likewise, the Congress Avenue freight train yard and mechanical facilities of the International constructed about 1870, are located in the downtown congested area of Houston. These facilities became inadequate about 1920 and thereafter an auxillary (sic) yard known as the Percival Yard was constructed, and both of these yards since have been operated by the International. Their operation has become unduly expensive because of the increased traffic and the operation of longer trains, and are now inadequate to handle the traffic of the two carriers using them, that is, the International and Sugarland, in an efficient and economical manner. The Belt and International freight train yards were constructed before the Beaumont, the Brownsville, the International, and the Sugarland became a part of the Missouri Pacific System, as they are today, and the performance of the work of the System lines partly in yards of the Belt and partly in yards of the International, results in delays in the interchange of their road haul cars and in the movement of cars to industries.

The plan proposed is said to offer a practical solution to these difficulties. Primarily it will permit the consolidation

[fol. 137] of the Terminal operations and all the Missouri Pacific lines entering Houston, and will enable Rock Island and the Denver to operate their trains into Houston as such and have the benefit of the Belt's terminal facilities."

Mr. Hoover: The second excerpt from page 11 of this opinion is as follows:

"The Belt is to have the exclusive management and control of the operation, maintenance, repair and renewal of the leased and owned terminal properties, except the mechanical facilities in the new yard. It will perform all the freight and passenger switching service within the terminal and operate the passenger and freight stations and pertinent facilities."

Redirect examination.

By Mr. Ryan:

Q. This morning you testified some mention had been made about the issuance of bonds by Houston Belt & Terminal in the amount of $5,000,000.00?

A. Yes, sir.

Q. Did the proprietary lines assume any obligation or liability with reference to the payment of those bonds issued by the Houston Belt & Terminal?

A. Yes, sir. Under the agreement they were to pay the interest and one per cent of the original issue each year as a sinking fund for the return of the principal.

Q. It is true, is it not, Mr. Chambers, that the Houston Belt & Terminal Company itself had no funds that it could devote to the interest and sinking fund for the payment of those bonds?

A. That is right. This payment was made as rental of the facilities.

Q. The proprietary lines represented the only source from which that money could come?

[fol. 138] A. Yes, sir.

Q. And the proprietary lines did advance some money to pay the interest and that sinking fund on the bonds, is that right?

A. Yes, sir.

By Mr. Hoover:

Q. The payments that were made and the advances that were made by the proprietary lines in the form of interest, or in any other way, was done in return for the service rendered by the Belt and in consideration of the benefits received by the proprietary lines?

A. Payments of that nature would be more in the nature of rental.

Q. Rental paid by the Belt?

A. Paid by the lines for the facilities.

Q. But they got the use of the facilities?

A. That is correct.

(Witness excused.)

[fol. 139] Francis A. Roemer, called as a witness by the plaintiffs, having been duly sworn, in response to questions propounded to him testified as follows:

Direct examination.

Questions by Mr. Ryan:

Q. State your name.

A. Francis A. Roemer.

Q. Your last name is spelled R-o-e-m-e-r?

A. Yes, sir.

Q. What is your job, Mr. Roemer?

A. I am business manager and chief clerk of the operating department.

Q. Of what?

A. Missouri Pacific Lines.

Q. How long have you held that job?

A. Since 1926.

Q. What did you do before 1926?

A. I was in the transportation department.

Q. Of the same railroad?

A. Yes, sir.

Q. Have you ever been connected with the Houston Belt & Terminal Railroad Company?

A. I was chief clerk to the general manager during the period of 1926 up until 1942.

Q. Well, from 1926 to 1942 you were at one and the same time chief clerk to the general manager of the Missouri Pacific Lines, and chief clerk and office manager for the general manager of the Houston Belt & Terminal Railroad, is that right?

A. Yes, sir.

Q. But since 1942 your job has been only chief clerk and office manager for the operating department of the Missouri Pacific Lines, is that correct?

A. Yes, sir.

[fol. 140] Q. Who is head of the operating department of the Missouri Pacific Lines?

A. Mr. R. B. Hare, of St. Louis.

Q. In 1949 who was head of the operating department?

A. I think Mr. R. C. White, of St. Louis.

Q. In this end of the Company who was head of the operating department, in 1949?

A. If you mean general manager, that is a different thing.

Q. All right, who was general manager in 1949?

A. In 1949, Mr. A. B. Kelley.

Q. Was the general manager in 1949 head of the operating department of Texas?

A. Yes, sir.

Q. Do you know the plaintiff in this case, Parris Sinkler?

A. Yes, sir.

Q. In what connection did you know him?

A. He was chef on the car, on the business car.

Q. Whose business car was that?

A. Mr. A. B. Kelley. It was assigned to Mr. A. B. Kelley, general manager.

Q. It was assigned to him for his use as general manager of the railroad, is that right?

A. Yes, sir.

Q. Do you recall what car that was in March, 1949, what was the number of it? Was it car 22?

A. Yes, sir.

Q. Now, in his capacity as general manager, was it nec-

essary for Mr. A. B. Kelley to make trips over various portions of the railroad lines?

A. Various portions of the Texas lines, yes.

Q. What are the Texas lines of the Missouri Pacific over which the general manager, Mr. A. B. Kelley, had jurisdiction in 1949?

A. The NOT&M.

[fol. 141] Q. That is the New Orleans, Texas & Mexico?

A. Yes, sir.

Q. Where is that located?

A. It is located from Orange to Sabine River.

Q. That is the line in Louisiana. On what other lines?

A. Beaumont, Sour Lake & Western.

Q. Where does that run?

A. Sabine River to Houston.

Q. What else?

A. Orange and Northwestern.

Q. Where does that run?

A. Between Orange and Newton, and St. Louis, Brownsville & Mexico.

Q. Where does that run?

A. Houston to Brownsville, and the Hidalgo branch, and The Port O'Connor and Victoria branch.

Q. Did you have jurisdiction over the I-GN at that time?

A. Yes, sir.

Q. Where does the I-GN run?

A. From Longview to Laredo, from Palestine to Houston, and from Houston to Fort Worth, and The Columbia Tap.

Q. Now, at that time the general manager had jurisdiction, as far as the operating department was concerned, on all of those lines in Texas and Louisiana?

A. Yes, sir.

Q. And it was necessary for him to travel over those lines at that time just to see that things were being done as they should be?

A. Yes, sir.

Q. In normal times he would make trips in the private car?

A. Yes, sir, usually. Sometimes he made trips without the car.

Q. Ordinarily he used the car, would he not?

A. Yes, or he might use some other car.

[fol. 142] Q. He might use some other private car?

A. Yes.

Q. But when he went out on car 22 it was the duty of the plaintiff, Parris Sinkler, to go with him as the cook on that car, was it not?

A. During the time he was available. If he was not available, they would use some one else.

Q. If he was available and able to work it was his duty to go?

A. Yes, from the time he started to work.

Q. Approximately, when did he start to work on that car?

A. I don't remember.

Q. If he has testified that it was in 1946 is that approximately right as you recollect?

A. That is approximately right, but he was not chef the entire time. That is, there were some intervals when he was not available.

Q. There was one time when he was off for seven months?

A. No, sir. I have reference to the time between 1942 and the time he went to work.

Q. Between 1942 and the time he went to work on the general manager's car, he was not assigned to the general manager's car?

A. That is right.

Q. He was in the dining car service?

A. I don't know what he did prior to that, because I didn't have any occasion to inquire.

Q. But after he went to work for the general manager in 1946 he continued as chef on the general manager's car?

A. Yes, sir.

Q. And he ordinarily went out with him when the general manager took his car out?

A. Yes, sir.

Q. And it was his duty to be available when the car went

[fol. 143] out?

A. Yes, sir.

Q. A normal crew on that car is the chef and the porter?

A. Yes, sir.

Q. Who ordinarily travels with the general manager when he went out besides the porter and the chef?

A. The secretary.

Q. Was it customary for the general manager to transact business of the railroad while he is out on that car?

A. He does some, yes.

Q. The car is equipped as an office?

A. Yes.

Q. He can receive messages on the car and receive correspondence, dictate letters and have them sent out by his secretary?

A. Yes, sir.

Q. Doesn't he usually do that when he is out on inspection trips of the railroad properties?

A. Yes.

Q. For instance, he goes to Harlingen on one end of the road, and might be transacting business while he was down there, affairs relating to any one of the other railroads?

A. Oh, he could, yes.

Q. If he goes to New Orleans on that end he might be there transacting business relating to th (sic) I-GN, or the St. LB&M?

A. Yes, if something came up.

Q. The general manager has to be on duty and on call 24 hours of the day, isn't that right?

A. Well, he usually is, except periods when he leaves the property, or goes off for any particular thing.

Q. If he goes on vacation or goes off the railroad entirely he makes arrangements to have somebody take care of [fol. 144] things while he is gone?

A. The office does that.

Q. But when he is out on the road or at home in bed he is subject to being called at any time, if anything comes up that demands his attention, isn't that right?

A. He is usually called, yes.

Q. If the general manager should go down, say to Harlingen, what are some of the things down in that area that he might be giving his attention to in the way of railroad business while he was down there?

A. It would depend entirely on what came up.

Q. What are some of the things that might ordinarily come up while he is down there?

A. It might come up in connection with cars.

Q. You have reference to freight cars?

A. Yes, sir.

Q. What might he do about freight cars?

A. There might be a bunch of bad orders and he would call the mechanical superintendent, or the car department and have them fixed.

Q. And there might not be a sufficient supply of cars down there to move the fruit and the crop, etc., that was available for movement?

A. He would get in touch with the office and find out what cars were coming.

Q. And find out why there were not enough cars there, and make arrangements for them to be brought in?

A. He would inquire what cars they had coming, and if he didn't think it was enough, or too many, he would tell them.

Q. And they would do something in response to what he would tell them.

A. Yes, sir.

Q. What kind of commodities in general moved from the [fol. 145] Valley area around Harlingen over your railroad?

A. Cotton, grain and perishables, and some petroleum.

Q. Where do those go that originate down there?

A. They go all over the country.

Q. Some of them might go on the Missouri Pacific lines as far as St. Louis, and on some railroad to New York?

A. That would be the natural flow.

Q. You have a very large movement of freight that moves east from the southern end of Texas over your lines to St. Louis, Chicago, and New York, do you not?

A. It goes to New York, Chicago, and the West, too.

Q. You have passenger traffic from that end of the State going north as far as St. Louis, or on to Washington and New York, and so forth, do you not?

A. Yes, sir.

Q. And in the other direction you have traffic coming from the East and from states outside the Texas generally over your lines to the southern part of Texas, isn't that right?

A. Yes, sir.

Q. You have a lot of two-way interstate traffic, do you not?

A. That is right.

Q. Do you recall the accident which has been testified about and which occurred on March 30, 1949, whereby plaintiff, Parris Sinkler, was injured while aboard car No. 22, on which he was working, and which was being switched at the Union Station?

A. What do you mean?

Q. Do you recall that anything of that sort occurred?

A. No, sir, I don't know that it occurred. I was not a witness to it.

Q. Did you see Parris Sinkler directly after that accident?

A. He came to the office.

[fol. 146] Q. He came to report to Mr. A. B. Kelley?

A. Yes, sir.

Q. What did Mr. A. B. Kelley do about that?

A. I don't know.

Q. Did he instruct you to give Parris any kind of permit or slip directing him to go to the Houston Clinic?

A. When anybody needs hospitalization, or a doctor, he usually gets a permit to show that he paid his hospital dues, and Parris Sinkler paid his hospital dues in the Missouri Pacific Lines Hospital Association and was entitled to a permit.

Q. Would you ordinarily issue such permits as part of your duties with reference to people working for the Missouri Pacific?

A. When I was so advised.

Q. Would you issue one to him as cook on the general manager's car?

A. If he came to the office, yes.

Q. As far as you know while he was cook on the general manager's car, do you know whether Parris Sinkler was a satisfactory employee?

A. That is a pretty big question, isn't it?

Q. Do you know whether he performed his duties satisfactorily?

A. As far as I know he was a good cook.

Q. That is what he was supposed to be?

A. Yes.

Q. So far as you know was his record?

A. I don't know his record, because there are some conditions I wouldn't know.

Q. You don't know anything unfavorable about that, do you?

A. As a cook, no.

Q. He couldn't have held that position as cook on the general manager's car for six or seven years, if he hadn't [fol. 147] been a good cook?

A. No.

Q. He would have to perform his services as cook to the satisfaction of the general manager, or he could not have stayed, could he?

A. No.

Cross examination.

Questions by Mr. Hoover:

Q. What is your present position?

A. Chief clerk and office manager of the Missouri Pacific Lines in the operating department.

Q. How long have you occupied that position?

A. Since May 31, 1926.

Q. Are you familiar generally with the operating agreement of certain lines with the Houston Belt & Terminal Railroad Company in connection with the operation of the Terminal facilities?

A. I know that the Houston Belt & Terminal performs a switching service for the proprietary lines or tenant lines of Houston Belt & Terminal.

Q. I show you an instrument, the front page of which has been identified and marked as plaintiff's exhibit No. 13. I will ask you if you are familiar with the agreement?

A. I am not familiar with the agreement. I know there is an agreement in effect.

Q. There has been introduced in evidence Section 2 of Article 3 of that agreement, which I will ask you to read.

A. "If any officer or employee of the Terminal Company shall be deemed by any of the railway companies to be incompetent, negligent, or guilty of unfairness or discrim-

ination, or otherwise unfit for the performance of his duties, such railway company or companies my (sic) deliver to the Terminal Company a written demand for the removal of [fol. 148] such officer or employee, and thereupon the Terminal Company shall dismiss such officer or employee within the time mentioned in such demand."

Q. During the time you have been chief clerk for the general manager of the Missouri Pacific lines, have you ever known of any demand being made by your line on the Belt for the removal of such employee?

A. I do not.

Q. You will notice that the member lines or parties to that agreement are Beaumont, Sour Lake & Western, St. Louis, Brownsville & Mexico, Santa Fe, Burlington, Rock Island, Fort Worth & Denver City. Now, do you know as a fact that the Gulf, Colorado & Santa Fe, and the Burlington Rock Island are competing railway carriers coming in and out of the State?

A. Yes, sir.

Q. And they compete both for freight and passenger traffic, do they not?

A. Yes, sir.

Q. Do you know what other railroads run into the station at Houston?

A. You mean besides the Belt lines?

Q. Yes.

A. It would be the Southern Pacific and the MKT.

Q. Do you know whether or not they have any interest in the Houston Belt & Terminal?

A. No, they have no interest in the Houston Belt & Terminal Railroad Company.

Q. They have no interest at all?

A. No.

Q. Do you know whether or not the Belt performs certain switching service for those lines?

A. Yes, they would perform all of the switching service for industries located on the Houston Belt & Terminal [fol. 149] Lines.

Q. Do you know whether or not in performing this service for other lines they operate under a separate contract?

A. They operate under a switching charge which is covered by the tariff.

Q. You are not a tariff man?

A. No.

Q. Actually you know nothing about the accident down there that happened on March 30, 1949, in which Parris Sinkler claims to have been injured?

A. No, sir, I don't know anything about it.

(Witness excused.)

Mr. Smith: At this time we offer in evidence a portion of the deposition of Walter Louis Magee.

(The deposition above introduced was read to the jury, the portion introduced by the plaintiff being as follows:)

WALTER LOUIS MAGEE was called as a witness by the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. Will you state your name, please sir?

A. Walter Louis Magee.

Q. Mr. Magee, for whom do you work?

A. Houston Belt & Terminal.

Q. What is your capacity with the Houston Belt & Terminal?

A. Superintendent.

Q. How long have you been superintendent?

A. Since June 1, 1950.

Q. Had you been with the Houston Belt & Terminal prior to that time?

[fol. 150] A. Prior to that time I had worked for the Houston Belt & Terminal from April 23, 1920, until July 10, 1936. At that time I worked for the Missouri Pacific as general yard master on the San Antonio, Uvalde & Gulf at Corpus Christi, and I was in that capacity until December, 1943. I worked for the Southern Alkali Corporation at Corpus Christi until August 1946. In 1946 I came back to the Houston Belt & Terminal as train master at the new South Yards and on June 1, 1950, I was ap-

pointed superintendent under the consolidation of terminals.

Q. What was your job in the middle of March, 1949?

A. I was train master.

Q. Train master?

A. Yes.

Q. That was out of the new South Yards?

A. Yes, sir.

Q. And you have been superintendent since June 1, 1950; is that right?

A. That is correct.

* * * * * * *

[fol. 152] Q. Who is the claim agent at the Houston Belt & Terminal?

A. Mr. Borroum.

Q. Mr. C. R. Borroum?

A. Mr. C. R. Borroum.

Q. Do you know whether or not he is also the general claim supervisor for Guy A. Thompson, trustee, of various railroads that go to make up the various Missouri Pacific Lines?

A. I think he is.

Q. Now, Mr. Magee, can you tell us what Houston Belt & Terminal Railway Company is?

A. It is an independent switching carrier. Its capital stock is owned by Santa Fe and Missouri Pacific Lines and Rock Island and Fort Worth and Denver. It is carried as class 1, I believe, among switching carriers, I.C.C., Interstate Commerce Commission.

[fol. 153] Q. You referred to the stock ownership of this Houston Belt & Terminal Railway as being held in the Missouri Pacific Lines. Do you know a little more exactly how that stock is held insofar as what you refer to as Missouri Pacific Lines are concerned.

A. Well, no, I don't know positively. I wouldn't want to be positive about it because that's more or less of the executive, but I do know that the member line which is originally composed of the B.S.L.&W. and the St. L.B.& M.——

Q. Now, when you refer to the B.S.L.&W., Mr. Magee, you are referring to the Beaumont, Sour Lake & Western Railroad Company?

A. That's right.

Q. And when you refer to the St.L.B.&M., you are referring to the St. Louis, Brownsville & Mexico?

A. St. Louis, Brownsville & Mexico.

Q. Now, is it not a fact that Guy A. Thompson is presently the trustee and has been the trustee for many years of those two last mentioned lines?

A. Well, as far as I know he is.

Q. He is, as far as you know?

A. Yes.

Q. Well, that is a matter of pretty common knowledge among railroad people, isn't it?

A. Yes, sir.

Q. Now, you say that those last two mentioned railroad companies of which Guy A. Thompson is trustee are owners of stock of the Houston Belt & Terminal?

A. As far as I know.

Q. Those are two of the so-called member lines?

A. Yes, sir.

Q. Don't you know as a fact, Mr. Magee, that each one of those two lines, the St. Louis, Brownsville & Mexico and [fol. 154] the Beaumont, Sour Lake & Western Railroad Company of which Mr. Guy A. Thompson is trustee, each own twenty-five percent or one-quarter of the Houston Belt & Terminal Railway stock?

A. I don't know that.

Q. You don't know that?

A. No, sir.

Q. And you don't know that together they own half of the stock in the Houston Belt & Terminal Railway; is that right?

A. No, I didn't know how it was divided among the member lines.

Q. You don't know how it was divided?

A. No, sir.

Q. Now, what does the Houston Belt & Terminal do for these member lines that you referred to?

A. Well, the Houston Belt & Terminal does the passenger and the freight switching of the lines mentioned and also does switching for anything received from the connecting lines, too.

Q. You say it does the passenger switching for these member lines?

A. Yes, sir, passenger and freight.

Q. Passenger and freight, yes, sir. The member lines use the Union Station as their passenger terminal, do they not?

A. That's right.

Q. Who owns the Union Station property, if you know?

A. Well, I don't know. I wouldn't say positively.

Q. Well, don't you know that it is owned by the Houston Belt & Terminal, Mr. Magee?

A. Well, I would say that it is owned by the Houston Belt & Terminal for the simple reason that the Houston Belt & Terminal and the other member lines pay rent. [fol. 155] Therefore, it is the Belt property.

Q. That's right. And the Houston Belt & Terminal, if I understand you correctly, does the switching of passenger trains and cars which the member lines run into the Union Station; is that correct?

A. That is correct.

Q. If the train of one of these member lines comes into the Union Station and stops and discharges passengers, then does the Houston Belt & Terminal break up that train and switch various cars wherever they need to go?

A. Yes. That is part of the job.

Q. That is part of the job?

A. Yes.

Q. That's what the Houston Belt & Terminal is supposed to do, isn't it?

A. Yes.

Q. Does it do that job regularly for Guy A. Thompson as trustee of the Beaumont, Sour Lake & Western?

A. It does the job for all of them.

Q. And those include among others Guy A. Thompson as the trustee of the Beaumont, Sour Lake & Western?

A. Right.

Q. They include Guy A. Thompson as trustee of the St. Louis, Brownsville & Mexico, don't they?

A. Well, I presume he is trustee.

Q. You presume he is trustee?

A. Yes.

Q. Well, does it include the switching for what you know as the St. Louis, Brownsville & Mexico?

A. Yes, sir.

Q. Does it include switching for the International Great Northern?

A. It does.

Q. As far as you know, Mr. Magee, is Guy A. Thompson trustee of the International Great Northern?

[fol. 156] A. As far as I know, he is.

Q. The International Great Northern is one of those generally referred to as to the Missouri Pacific Lines, is it not?

A. That is correct.

Q. Now, for what other lines does the Houston Belt & Terminal perform this switching service?

A. They perform it for the Santa Fe, the G.C.&S.F., and the joint Texas division of the Burlington, Rock Island, (sic)

Q. I see. Now, as far as you know, Mr. Magee, does Guy A. Thompson as trustee of any of these railroads we have mentioned, St. Louis, Brownsville & Mexico, Beaumont, Sour Lake & Western, the International Great Northern, have any passenger terminal in the city limits of Houston other than the Houston Belt & Terminal properties?

A. None other than the Houston Belt & Terminal, no, sir.

Q. All right. As far as you know, is all of the switching of passenger trains, leaving freight aside for the moment, is all of the switching of passenger trains belonging to each of these three railroads which Guy A. Thompson is trustee done by the Houston Belt & Terminal?

A. At Houston?

Q. At Houston, yes.

A. At Houston, yes.

Q. Then can you tell us whether or not Guy A. Thompson as trustee of any one of these three railroads has any switching crews in Houston for the purpose of performing switching of passenger trains?

A. No.

Q. He has not?

A. No.

Q. As far as you know, is all of that switching work

done for Guy A. Thompson as trustee of each of those [fol. 157] three railroads by Houston Belt & Terminal?

A. It is done on account of the Missouri Pacific Lines.

Q. Well, Missouri Pacific Lines is just kind of a general name, isn't it, Mr. Magee?

A. Yes, sir.

Q. You recognize the existence of several different railroads?

A. Yes.

Q. All of which are under the control of Guy A. Thompson, trustee; is that right?

A. Insofar as I know.

Q. As far as you know?

A. Yes, sir.

Q. And collectively they are referred to for convenience as the Missouri Pacific Lines; is that correct?

A. That is correct.

Q. Wouldn't it be cheaper for the Missouri Pacific Lines as trustee of each one of these railroads to maintain its own switching crew at Houston?

A. I wouldn't be in a position to say whether they would or not.

Q. You don't have any idea whether he would or would not save money by having his own switching crew?

A. I have an idea, but I am not saying it is correct. I may not be correct.

Q. Well, what is your idea about that?

A. Well, my idea is that if it was cheaper they would be doing it.

Q. In other words, as I understand you, Mr. Magee, all of that passenger switching for Guy A. Thompson as trustee is now done by the crews of the Houston Belt & Terminal?

A. Yes, sir.

Q. And none of it is done by crews of Guy A. Thompson, [fol. 158] trustee, and your inference which seems to be a pretty sound one is that if it were cheaper to have his own crews, he would have his own crews?

A. In all probability, yes, sir.

Q. Now, Mr. Magee, do you have any knowledge at all of the incident about which this lawsuit is centered, which

is shon (sic) in the pleadings, the accident occurring on or about March 30, 1949, down at the Union Station?

A. No personal knowledge, no, sir.

Q. You have no personal knowledge of it?

A. No, sir.

Q. As I understand it, you were not actually located at the Union Station at that time?

A. No.

Q. You were out at the South Yards?

A. That is right.

Q. But since June 1, 1950, you have been at the Union Station?

A. Yes, sir.

Q. You spoke of a reorganization of terminals on June 1, 1950, I believe, Mr. Magee.

A. Yes.

Q. Could you tell us briefly what took place as far as you understand it at that time?

A. Well, at that time the lines consolidated—what I mean by "consolidated", they leased the facilities of the International Great Northern Railroad to the Houston Belt & Terminal, I think, and that included the new Settegast Yards. If my knowledge is correct, I think it was a ninety-nine year lease or something to that effect. That brought about an exchange of employees, the International Great Northern operating employees. I mean by that, the switchmen and clerks came under the Houston Belt & Terminal and had their seniority under The Houston Belt [fol. 159] & Terminal.

Q. Now, did that consolidation or rearrangement at that time affect the matter of switching passenger trains that came into the Union Station?

A. No, sir, it didn't. Houston Belt & Terminal Company had always handled IGN trains for many years prior to June 1st.

Q. That's June 1, 1950?

A. Yes.

Q. Now, as I understand it, the IGN had been doing some freight switching of its own prior to June 1, 1950?

A. That is right.

Q. Houston Belt & Terminal had handled both passenger

and freight switching for the Beaumont, Sour Lake & Western and St. Louis, Brownsville & Mexico?

A. Yes, sir.

Q. And it had been doing that for how long?

A. Well, I don't know exactly. It has been done ever since the Belt was organized, I suppose.

Q. Do you know when the Belt was organized?

A. I think it was in 1907.

Q. So for about forty years prior to 1950 the Houston Belt & Terminal had been switching both freight and passenger trains for the St. Louis, Brownsville & Mexico and Beaumont, Sour Lake & Western; is that right?

A. That is right.

Q. Now, in March of 1949 was the Houston Belt & Terminal switching passenger trains of the St. Louis, Brownsville & Mexico and Beaumont, Sour Lake & Western?

A. Yes, sir.

Q. And the International Great Northern?

A. Yes, sir.

Q. It was switching all passenger trains that came into the Union Station; is that correct?

[fol. 160] A. That is correct.

Q. Now, from the operating standpoint, as far as you know, has there been any change between March of 1949 and now about the handling of passenger trains at the Union Station, as far as the Houston Belt & Terminal is concerned?

A. Not during that period, no, sir.

Q. In other words, has it been doing ever since March of 1949 at least just what it is doing now?

A. The same as today, yes, sir.

Q. And as far as you know, had it been doing that same thing and carrying on the same procedure with respect to passenger trains that came into the station for some years before 1949?

A. That is correct.

* * * * * * *

[fol. 162] Q. You have previously told us the claim agent's name. Would you repeat it, please?

A. Mr. C. R. Borroum.

Q. Mr. C. R. Borroum?

A. Yes.

Q. Now, is he the head of the Houston Belt & Terminal claim department, as far as you know?

A. As far as I know, he is, yes, sir.

Q. And as I understand your testimony, he is the man who would have custody of the records?

A. Yes, sir.

Q. In the claim department?

A. In the claim department.

Q. I believe I understood you to testify earlier, Mr. Magee, that Mr. Borroum, in addition to being claim agent for the Houston Belt & Terminal, was general claim Supervisor for Guy A. Thompson, trustee, of these various lines, that is, the St. Louis, Brownsville & Mexico, the International Great Northern and the Beaumont, Sour Lake & [fol. 163] Western?

A. I don't know what his title is as to claim supervisor, but as far as the Missouri Pacific Lines are concerned it is one or the other.

Q. Is he head of the personal injury claim department?

A. Yes.

Q. You mean he is head of the personal injury claim department of the railroads that you referred to as the Missouri Pacific Lines?

A. Yes, sir.

Q. And he also head of the personal injury claim department of the Houston Belt & Terminal?

A. Yes, sir."

[fol. 164] L. A. Bruns, called as a witness by the plaintiff, having been duly sworn, in response to questions propounded to him, testified as follows:

Direct examination.

Questions by Mr. Ryan:

Q. State your name.

A. L. A. Bruns.

Q. Where are you employed, Mr. Bruns?

A. In the Union Station.

Q. For whom do you work?

A. Missouri Pacific Lines.

Q. What is your position?

A. Assistant to the senior executive assistant.

Q. Who is your senior executive assistant?

A. He is in charge of the Texas and Louisiana Lines for Missouri Pacific, and top officer in Houston.

Q. He is the top officer in Houston for your lines?

A. Yes, sir.

* * * * * * *

[fol. 165]. Q. Now, Mr. Bruns, I believe it is in evidence here that the railroad referred to as Missouri Pacific Lines [fol. 166] are now being operated by Mr. Guy Thompson as trustee under the jurisdiction of the Federal Court in St. Louis?

A. Yes, sir.

Q. And those lines comprise in this part of the country the StLB&M, the I-GN, Beaumont, Sour Lake & Western, NOT&M in Louisiana, and possibly several others, is that right?

A. That is correct.

Q. Now, the senior executive assistant down here at Houston has jurisdiction over those lines I have mentioned that are in Texas and Louisiana, isn't that right?

A. Yes, sir, that extends to the chief executive officer in St. Louis.

Q. There are also in existence the corporations that formerly operated those properties who are now in bankruptcy at present?

A. Yes.

Q. Are you a director of any of these corporations mentioned?

A. All of them.

Q. Are you a member of the Board of Directors of the Houston Belt & Terminal?

A. Yes, sir.

Q. Approximately how long have you been a director of the Missouri Pacific Lines and the Houston Belt & Terminal?

A. I was elected to the Board of Houston Belt & Ter-

minal February 5, 1949. I was not present at the meeting, though, and the first meeting I attended was April 1, 1949.

Q. 1949?

A. Yes, sir. I went on the Board of the various subsidiaries in June, 1949, and I went on the Board of the I-GN in October 1948.

[fol. 167] Q. Then by the various subsidiary companies, on which you became a Director in 1949, do you mean to refer, among others, to the NOT&M, StLB&M, and Beaumont, Sour Lake and Western?

A. Yes, sir.

Q. And as to the I-GN, you became a Director some time in 1948?

A. October, 1948, yes.

Q. Are you familiar with the stock ownership set up of the Missouri Pacific Lines, the way in which the stock of these subsidiary companies you have mentioned is held?

A. Of the subsidiary companies?

Q. Yes.

A. They are all owned 100 per cent by the NOT&M.

Q. The NOT&M owns the stock of the Beaumont, Sour Lake and Western?

A. Yes, sir.

Q. And of the St. Louis, Brownsville & Mexico?

A. Yes, sir.

Q. And the I-GN, is that right?

A. Yes, sir.

Q. 100 per cent, approximately 100 per cent?

A. Yes.

Q. Who owns the stock of the NOT&M?

A. The Missouri Pacific, 92 per cent.

Q. That is the Missouri Pacific Railroad Company, is that right?

A. Yes.

Q. Are you familiar with the stock ownership set up of the Houston Belt & Terminal?

A. Yes, sir.

Q. What is that?

A. The Houston Belt & Terminal is a separate entity, and [fol. 168] is a separate corporation, and the Missouri Pacific, Beaumont, Sour Lake & Western, own 25 per cent;

StLB&M owns 25 per cent; the Santa Fe owns 25 per cent; the Fort Worth & Denver owns 12½ per cent, and the Burlington, Rock Island owns 12½ per cent.

Q. Was that situation the same back in 1949 as it is now?

A. Yes, sir.

Q. And was the stock ownership of the Missouri Pacific Lines and its subsidiaries that you have mentioned, the same in 1949 as it is now?

A. Yes, sir.

* * * * * * *

[fol. 172] Cross examination.

By Mr. Hoover:

Q. I believe you stated you were a director of the several lines composing the Missouri Pacific system now?

A. Yes, sir.

Q. You are also and have been since 1949, February of 1949, a director for the Houston Belt & Terminal Railroad Company?

A. Yes, sir.

Q. And being a director you are generally familiar with the operations of the corporation through its Board of Directors, are you not?

A. Yes, sir.

Q. When you went on the Board of Directors of the Houston Belt and Terminal how many directors comprised that Board of Directors?

A. Eight.

[fol. 173] Q. Isn't it unusual for them to have an even number of directors for the corporation?

A. I think every one I am on now has an odd number.

Q. Are there still just eight directors on the Houston Belt and Terminal?

A. No, there are nine now. The other director is president of the Houston Belt and Terminal.

Q. When was the ninth man added?

A. June 1, 1950.

Q. Well, now, in the functioning of the Board of Directors prior to the time you have had an odd number, cus-

tomarily isn't it required that you have to have a majority agree on certain managerial matters?

A. If you don't you would not pass anything.

Q. Since you have been on the Board of the Directors of Houston Belt & Terminal has it ever come about that you had four and four?

A. Yes, sir.

Q. What happened then?

A. Status quo, no action was taken.

Q. If they vote four and four there is no action the Board of Directors could take?

A. That is right.

Q. Under those circumstances, could any one of the Board of Directors alone take any action without the consent of the other members?

A. Not as I know of.

Q. In other words, it was just status quo?

A. Yes, sir.

Q. You say you added this president in June of 1950?

A. Yes, sir.

Q. Prior to that time who was the operating head of the Houston Belt and Terminal under this Board of Directors? I take it you didn't have a president?

[fol. 174] A. They were supposed to alternate but they didn't alternate. The Santa Fe man got in and he was president. He said no when they tried to vote him out. There was still that four and four vote, and he just stayed.

Q. In other words, was there a little difficulty in trying to agree upon a new president?

A. Yes, sir.

Q. Finally, who did the Board of Directors bestow that honor upon?

A. Mr. J. T. Alexander. He is the present president since June 1, 1950.

Q. And he is also a member of the Board of Directors?

A. That is correct.

Q. You now have nine members of the Board of Directors?

A. Yes, sir.

Q. So now you can have a majority act on any managerial matter without going to court?

A. Yes.

Redirect examination.

By Mr. Ryan:

Q. In these four to four votes prior to 1950, didn't the four Missouri Pacific Directors vote as a unit?

A. Yes, sir.

Q. Do you recall any instances in which one of those Directors voted in a manner different from the other Directors representing the Missouri Pacific Lines?

A. No, I do not.

Q. That would be a highly unusual case if that could happen, wouldn't it?

A. I would think so.

Cross examination.

By Mr. Hoover:

Q. As long as the four Missouri Pacific Directors voted [fol. 175] in a block, and the Santa Fe, Burlington and Rock Island also voted in a block, then no action could be taken, is that right?

A. Yes, sir.

Q. Nobody could tell the Belt Directors what to do in that situation?

A. Definitely no.

Q. They could not?

A. No.

Redirect examination.

By Mr. Ryan:

Q. Do I understand you if any proposed action of the Board of Directors of the Belt should have been opposed by the Missouri Pacific, that their four votes could block any action, and nothing could be done, you would just have a deadlock?

A. To the extent that the other four could block something.

Q. Each group had the power of veto over the other?

A. Yes.

By Mr. Hoover:

Q. Just because they were Directors?
A. That is correct.

[fol. 176] W. J. SCHILL, called as a witness by the plaintiff having been duly sworn, in response to questions propounded to him, testified as follows:

Direct examination.

By Mr. Ryan:

Q. State your name.
A. W. J. Schill.
Q. What is your job?
A. General freight agent of the Missouri Pacific Lines.
Q. How long have you held that job?
A. Since 1943.
Q. What did you do before 1943?
A. I was the assistant general freight agent.
Q. For approximately how long?
A. About twenty years.
Q. Were you ever employed in any way by the Houston Belt & Terminal?
A. Yes, sir.
Q. In what capacity?
A. As general freight agent.
Q. Over what period?
A. Well, from August, 1943, until sometime in 1950, as I recall.
Q. So that from 1943 until 1950 you were at one and the same time general freight agent for the Missouri Pacific and general freight agent for the Houston Belt & Terminal, is that right?
A. Yes, sir.
Q. Did you draw a salary from both of those companies during that time?
A. I drew one salary.
Q. Who paid that salary?
A. The Missouri Pacific.

Q. Was your salary diminished to any extent when you gave up the position of general freight agent for the Hous-
[fol. 177] ton Belt & Terminal?

A. No, sir.

Q. I will show you a document to look at and to refresh your recollection, and then I want to ask you a few questions. Have you looked at that?

A. Yes, sir.

Q. Do you recall that generally now?

A. Yes, sir.

Q. There is some mention in there of correspondence that you had with Mr. F. L. Gordon of the Texas and New Orleans Railroad Company. What position does Mr. Gordon hold, or did he hold, at that time with the T&NO?

A. He was freight traffic manager.

Q. Was he in the same department with the T&NO as you were with the Missouri Pacific?

A. Yes, sir.

Q. And T&NO is what is generally referred to as the Southern Pacific Lines?

A. That is right.

Q. What was it that you and Mr. Gordon were corresponding about, arguing about, at that time?

Mr. Hoover: I think it would be desirable if I could be permitted to take Mr. Schill on voir dire before he gets too far into this instrument he has looked at.

(At this time counsel approached the Bench and conversed with the Court.)

Q. What was it that you and Mr. Gordon were corresponding or arguing about at that time?

A. Oh, it was a Terminal matter involving the Belt line.

Q. And the T & N O?

A. Yes, sir.

Q. And by the Belt Line, do you mean the proprietary
[fol. 178] lines of the Houston Belt and Terminal Company?

A. Yes, sir.

Q. Including the StLB&M, Beaumont, Sour Lake and Western?

A. Yes, sir.

Q. What was the nature of the argument or discussion you were having, briefly, can you just state the substance of it?

A. It was involving a Terminal switching matter in which the Southern Pacific was attempting——

Q. (Interrupting) Wasn't this the substance of it, that the Southern Pacific wanted the Houston Belt & Terminal to switch certain cars for the Southern Pacific on the Houston Belt and Terminal team track, or public delivery track?

A. Yes, sir.

Q. And the Houston Belt & Terminal did not want to do that, is that right?

A. That is true. That is customary with all switching lines.

Q. The Houston Belt and Terminal has certain public delivery tracks spotted around town, does it not.

A. Yes, sir.

Q. For the delivery of freight?

A. Yes, sir.

Q. And the T&NO has certain tracks of its own for the use of the public, delivery tracks for freight, does it not?

A. Yes.

Q. Now, the proprietary lines of the Houston Belt and Terminal Company did not have any public delivery tracks of its own, did they?

A. Well, possibly with one exception I would say.

Q. Well, with that exception the Houston Belt and Terminal handles all such matters for the proprietary lines?

A. Yes, sir.

Q. And they did in 1949?

[fol. 179] A. Yes, sir.

Q. And have done so for a number of years prior to that time?

A. Yes.

Q. Now, if a shipper here, who was located near a public delivery track of the Houston Belt and Terminal here in Houston wanted to have shipped to him a carload of freight, say from Brownsville, that could come up over the Missouri Pacific, or over the T&NO, generally speaking, couldn't it?

A. Yes.

Q. If it came in over the Missouri Pacific Lines, it would arrive in Houston over a Missouri Pacific train and the Houston Belt and Terminal would then pick it up and switch it to the Houston Belt and Terminal team track, or public delivery track, where the shipper could take delivery of it, isn't that right?

A. Yes, sir.

Q. Now, if that same carload of freight—when the Houston Belt and Terminal did that it would not make any specific charge against the shipper for performing that switching operation, would it?

A. No.

Q. That switching operation would be done as part of the line haul charge the shipper would pay the Missouri Pacific Lines, isn't that right?

A. Yes, sir.

Q. So the shipper would pay just one freight charge, and he would get the freight switched onto the track where he wanted it and take delivery of it?

A. Yes.

Q. If that same shipper, however, shipped that same car of freight from Brownsville to Houston over the Southern Pacific and he wanted it delivered to the HB&T's team track, [fol. 180] the situation would be different, woult (sic) it not?

A. Yes, sir.

Q. The HB&T would either refuse to make that switching movement at all, or if it did make it, it would assess a separate charge for it under its switching tariffs and it would insist that the shipper, or the consignee of the freight, pay that charge himself, wouldn't it?

A. Yes, sir.

Q. It would not allow the T&NO, or the Southern Pacific Lines to absorb that charge as a part of the line haul rate, would it?

A. Yes.

Q. Now, with respect, then, to industries located on the Houston Belt & Terminal team track,—your last answer was what?

A. The answer should be no instead of yes.

Q. My statement was correct?

A. Yes, sir.

Q. That the HB&T would not permit the T&NO to absorb that charge as part of the line haul rate?

A. That is right.

Q. Now, therefore as to industries situated on the Houston Belt and Terminal team tracks, the proprietary lines of the Houston Belt and Terminal, including the StLB&M, Beaumont, Sour Lake and Western, they have an inherent competitive advantage over the Southern Pacific, don't they?

A. I couldn't agree with you in that other than it is a team track on their lines, and it is just normal with the Terminal lines.

Q. It is normal competitive advantage.

A. Well, it would be normally, yes.

Q. Now, of course, with respect to industries situated on T&NO team tracks, the T&NO has the same advantage over the proprietary lines of the HB&T, doesn't it?

[fol. 181] A. That is true. They might be located near enough together where that condition might not altogether control.

Q. Some shipper might be located conveniently to the tracks of both railroads?

A. Yes, sir.

Q. And in that case he could pick and choose?

A. That is correct.

Q. But if a shipper is located only on Houston Belt and Terminal team tracks, and wants to take delivery there, he has got to have freight moved into Houston by one of the Proprietary lines of the Houston Belt and Terminal Company in order to keep it from costing him more money, isn't that right?

A. That is correct.

Q. Wasn't that the basic situation that you and Mr. Gordon were talking about back there in 1949?

A. Yes, sir. Mr. Kelley drew up this instrument at that time. He was our general attorney.

Q. Now, I am not offering the instrument in evidence and I am not asking you what is in it. I understand Mr. Hoover might make some objections. Wasn't that the situation you and Mr. Gordon were discussing in 1948 and 1949?

A. Yes, sir.

Q. Now, didn't you, as general freight agent of the Houston Belt and Terminal, and also as freight agent of the Missouri Pacific, take the position in that discussion with Mr. Gordon that the Houston Belt and Terminal team tracks should be reserved for the special use of the proprietary lines of Houston Belt and Terminal?

A. Yes, sir.

Q. In the same way that the T&NO team tracks were reserved for the T&NO?

[fol. 182] A. Yes, or any other line in Houston.

Q. And the HB&T if called upon by the T&NO to switch freight to an HB&T team track would, in effect, say "No, we don't want your money; we won't make that movement and let you pay for it". Is that correct?

A. That is correct.

Q. And that was the usual normal and ordinary course of business that the Houston Belt and Terminal Company pursued and always had pursued, isn't that right?

A. That is right.

Q. Now, as a result of that, Mr. Schill, the proprietary lines of the Houston Belt and Terminal Company had a competitive advantage over the T&NO with respect to traffic where either one of them might be able to make the line haul, that is traffic originating in areas which both of them serve, is that right?

A. Yes, sir.

Cross examination.

By Mr. Hoover:

Q. The matter of freight movement that Mr. Ryan has been asking about, and the charges that were imposed, and are imposed by the Belt for the switching movements to non-member lines, are those charges fixed by tariffs duly filed with the Interstate Commerce Commission?

A. They are, and with the Railroad Commission of Texas.

Q. How long have you been with the Missouri Pacific Lines?

A. Since 1921.

Q. Are you generally familiar with what lines 20 to 25 years ago composed the Southern Pacific Lines?

A. Yes, sir.

Q. There was the Houston & Texas Central, that was one?

A. Yes, sir.

Q. And the GH&SA?

A. That is right.

Q. And the T&NO?

[fol. 183] A. Yes, sir.

Q. And the HE&WT?

A. Yes.

Q. And the SA&AP, that was one of them?

A. Back in 1925 it was not a member of the Southern Pacific Lines as a corporate company.

Q. When the S. P. Lines embraced all of those railroads did the same situation with reference to switching tracks obtain as to the delivery tracks to the proprietary lines he has been questioning you about?

A. It was identical.

Q. So when a shipper shipped something in that was on the HB&T they had the competitive advantage?

A. Yes, sir.

Q. And if it was on the H&TC, or the HE&WT they likewise had the competitive advantage?

A. Yes, sir.

* * * * * * *

[fol. 186]

J. T. ALEXANDER, called as a witness by the defendants, having been duly sworn, in response to questions propounded to him testified as follows:

Direct examination.

By Mr. Hoover:

Q. State your name.

A. J. T. Alexander.

Q. Where do you live?

A. Houston, 3515 Maroneal.

Q. How long have you lived in Houston?

A. Since July 1, 1953.

Q. What is your position or occupation at the present time?

A. President and general manager of the Houston Belt and Terminal Railroad Company.

Q. How long have you occupied that position?

A. I have been president since July 1, 1953. I was elected general manager in December of the Same (sic) year.

Q. Are you or not a member of the Board of Directors of the Houston Belt and Terminal Railroad Company.

A. I am a member of the Board of Directors.

Q. How many members does the Board of Directors have at the present time?

A. Nine.

Q. Do you know whether or not that has always been the situation on the Belt with respect to the number of Directors it had?

A. Prior to my position that position was not filled. There was not a nine men (sic) directorate before I got there, but it was eight when I arrived on the scene.

Q. I want to ask you something about the operation of the Houston Belt & Terminal. To begin with, the Houston Belt and Terminal Railroad Company, if I understand it correctly, does all the switching in the Terminal facilities [fol. 187] down here in Houston, is that right?

A. That is correct; we do the Terminal switching.

Q. Does the Company own or lease its own switching equipment, the engines and things of that sort?

A. It owns or leases. It owns part and leases part.

Q. Who does the buying of that equipment?

A. We have our own puchasing (sic) agent, he does the buying.

Q. And on the matter of the employment of the switch crews, who hires the switching crews that are used throughout the yard?

A. My staff and I employ all of the men on the Houston Belt and Terminal. The train master or superintendent normally would hire the switching crew.

Q. Do the switching crews have their own seniority roster?

A. Yes, sir.

Q. Do the employees have their own labor organizations in the various crafts?

A. Yes. Our contracts with the employees of the Houston Belt and Terminal Company are covered by contract with the Houston Belt and Terminal.

Q. Who pays all of the switching crews?

A. We do, our treasurer is also the paymaster.

Q. And if it becomes necessary to discipline or discharge a member of the switching crew, or all of them, who does that?

A. That is done by my staff, the superintendent, ordinarily.

Q. Do you take instructions from anybody else as to whether you will discipline or discharge them?

A. No, sir, I have never had occasion to.

Q. Is that completely under your jurisdiction and control?

A. Yes, sir.

Q. Yes, sir. (sic)

Q. Now, then, in the matter of moving crews around the Union Passenger Station, and the making of those [fol. 188] moves by your switching crews, who gives them instructions as to the manner in which those moves are to be made?

A. Our yardmaster and he in turn is under the superintendent.

Q. They are all supervised by the employees of the Houston Belt and Terminal?

A. Yes, sir.

Q. The Houston Belt and Terminal is a switching carrier and has its own tariffs properly approved by the Interstate Commerce Commission, and that tariff has to do with the charges to be made by the Belt to lines other than the proprietary lines by the Belt, is that correct?

A. Yes, sir, and also to and from industries. We call it intra-terminal switching. The tariffs cover those charges.

Q. Do you have an operating contract, the Belt, with the so-called proprietary lines?

A. Yes, sir. The present one is called the 1948 Operating Contract.

Q. The moves made by the Belt for those lines and the charges to be made are based on the terms and provisions of that contract?

A. Yes, sir, the 1948 Operating Contract covers that.

Q. Those charges are made on a user basis?

A. Yes, sir, that is correct, a very complicated user basis.

Cross examination.

By Mr. Ryan:

Q. With what railroad were you associated before you came to the Houston Belt & Terminal?

A. I was superintendent of the Nashville Terminals, which was an organization owned by the L&N and some others, and was a terminal facility in Nashville.

Q. I believe you said you came here with the Belt July 1, 1953?

[fol. 189] A. Yes, sir, I was elected June 23, I believe it was, to take effect July 1.

Q. Prior to the time you were elected president of Houston Belt and Terminal there had been for three years no president of the Houston Belt?

A. I believe not. I am not too sure about that. There was none when I came here.

Q. There was nobody you succeeded in that job?

A. Not as president. I did succeed the general manager in December.

Q. That was after Mr. Leach had become ill?

A. Yes, sir, after he passed away.

Q. You are what is known as the Independent Director of the Houston Belt and Terminal?

A. I think the contract defines it.

Q. It is very careful about that.

A. Yes, that is true. The intention is that I am not to be associated with any other railroads.

Q. Each one of the other Directors of the Houston Belt and Terminal, besides yourself, is affiliated with or employed by one of the other stockholding lines of the Houston Belt and Terminal, isn't it?

A. Yes. One is an attorney. He is a member of their General Attorneys. I suppose he is.

Q. He is on a retainer as General Attorney for one of the stockholding lines?

A. It is Palmer Hutcheson, I don't know what his status is, but his firm is General Attorneys for the Missouri Pacific Lines in this part of the country.

Q. You mentioned this 1948 Houston Belt and Terminal operating agreement, is that the document you have in mind, which has been identified in evidence.

A. Yes.

Q. That is the document under which the Company has [fol. 190] been operating ever since you have been down here?

A. Yes, sir.

Q. You don't know anything about any previous agreement they had before this?

A. I know there was a 1907 agreement that this one superseded with possibly some additional agreements.

Q. You never had occasion to operate with the Company under the 1907 agreement?

A. No, I came here in 1953.

Q. And this agreement referred to as the 1948 Houston Belt and Terminal operating agreement had been in effect for several years before you got here?

A. It has been in effect since 1950, I understand.

Q. You had no connection with the Company in 1949?

A. No.

Q. You are not familiar with the details as set up in 1949?

A. I would say no. I have had a few occasions to refer to a few occurrences, but generally I would say no.

Q. When one of your train service employees, switchman or something like that, at the Houston Belt and Terminal is injured in the course of his employment and you, or Houston Belt and Terminal, wanted to make a settlement with him, pay him if he has got anything coming to him, is it not a fact that you have to get the approval of the executives of each one of the stockholders lines before you can make any such settlement with anybody and pay out any money?

A. It would not be a matter of one. If the contemplated settlement was of substantial size I would have to take it up with the Directors. But up to certain amounts,—

we have a dividing line where we can authorize payment up to a certain amount, but I am subject to the action of the executives committee.

[fol. 191] Q. If the amount is amall (sic) you can ordinarily handle it, but if it is substantial you have to get the approval of the executive committee?

A. If it goes into substantial figures I have to get the approval of the HB&T'S (sic) executive committee.

Q. Who makes up the Houston Belt and Terminal executive committee?

A. The present committee is Mr. Osborne of Galveston, Mr. F. E. Bates of Houston, Mr. Wright Armstrong of Fort Worth, Mr. John Splawn of Fort Worth, and Mr. E. C. Sheffield of Houston.

Q. What is the principal position of each of those gentlemen, first, Mr. Osborne?

A. Mr. Osborne is general manager of the Gulf, Colorado & Sante Fe.

Q. It is one of the stockholding lines of the Houston Belt and Terminal?

A. Yes, sir.

Q. Mr. F. E. Bates holds what position?

A. He is—his title is executive assistant of the Missouri Pacific.

Q. Senior executive?

A. Yes, sir, that is right, first executive assistant.

Q. Mr. Wright Armstrong holds what position?

A. He is vice president of the Ft. Worth and Denver City.

Q. That, of course, is a stockholding line of the Houston Belt and Terminal?

A. Yes, sir.

Q. Mr. Splawn, what is his position?

A. Assistant to the president of the Rock Island.

Q. And the Rock Island is, of course a stockholding line of the Houston Belt and Terminal?

A. Yes, sir.

Q. And Mr. E. C. Sheffield holds what position?

[fol. 192] A. He is general manager of the Missouri Pacific, the Gulf Coast Lines of the Missouri Pacific.

Q. He succeeded Mr. Hammer who died sometime ago?

A. Yes, sir.

Redirect examination.

Questions by Mr. Hoover:

Q. Has there been any changes made by you as president and Director of the Houston Belt and Terminal in the manner in which the switching operations are conducted by your switch crews around the Union Station since you have been here as president? Have you made any changes, or have there been any made?

A. There have been numerous changes. We have to change our switching crews according to the business.

Q. I mean as to the general manner in which you perform the functions of switching cars. Has there been any change in that respect?

A. I would say no. We generally follow the same pattern. We are governed by the Union Code of Operating Rules. There is a difference in enforcement sometimes, but I would say that the switching is being done on about the same pattern down through the years.

(Witness excused).

* * * * * * *

[fol. 193] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 195] IN THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT, BEAUMONT, TEXAS

No. 6002

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, ET AL, Appellants,

v.

PARRIS SINKLER, Appellee.

OPINION—November 1, 1956

Sinkler, the plaintiff in this action, was an employee of the several railroad corporations represented on this appeal and as defendants below by the Trustee. Plaintiff served

as a cook on the car used by an officer of said railroad corporations in the performance of his duties. This car, with plaintiff on board as cook, was brought into the Union Depot at Houston, apparently by one of the Trustee's corporations, the St. Louis, Brownsville & Mexico Ry. Co., as one of a train of cars, and later that day, with plaintiff again on board and again engaged in performing his duties, was moved to another track at this station. This movement was made by employees and property of the Houston Belt & Terminal Railway Company. During the course of the movement, the engineer failed to comply with a signal given him by another member of the switching crew, and in consequence the plaintiff's car was driven against another car with heavy force and the plaintiff was thrown against a part of his own car and injured. The plaintiff subsequently brought this action against the Trustee under the Federal Employers Liability Act, namely, Sections 51 et seq., Title 45, USCA, to recover damages for these injuries, and no question has been raised concerning the application of this statute to the case. The Houston Belt & Terminal Railway Company was not a party to the suit. The cause was tried to a jury and on the jury's verdict the trial court rendered judgment for the plaintiff against the Trustee for $15,000.00. The Trustee was sued as the representative of five railroad corporations and was adjudged not liable in the case of two. He was adjudged liable as Trustee of the other three, the New Orleans, Texas and Mexico Railway Com- [fol. 196] pany, the Beaumont, Sour Lake & Western Railway Company and the St. Louis, Brownsville and Mexico Railway Company. From the trial court's judgment the Trustee has appealed.

The Houston Belt & Terminal Railway Company was at the time of the plaintiff's injury and still is a corporation, separate and distinct in form from the various railroad corporations represented by the Trustee. The plaintiff was injured on the Belt's track, its property, and his injury, as our statement shows, was caused by the Belt's employees. These employees, again, were subject to, and only to, the direction and control of the Belt's officers and were switching the plaintiff's car pursuant to a contract between the Belt and the corporations represented by the Trustee which pur-

ported to make the Belt an independent contractor for the purpose, among other matters, of and while switching cars, including the plaintiff's car, of the other parties. It appears, therefore, that the trial court's judgment is erroneous and must be reversed unless the Belt actually was not an independent contractor or unless the Belt's status as an independent contractor is not material.

It is contended by the plaintiff under his second counterpoint that the Belt was a separate corporation in form only and being so, was no more than an agent of the Trustee's corporations for whose negligence the Trustee would now be liable. And in response to Issue 3, the jury found that in switching the plaintiff's car the Belt was "acting as agent" for the Trustee's corporations adjudged liable, and in response to Issue 4, found that a preponderance of the evidence did not show that the Belt was an independent contractor in switching the plaintiff's car. The trial court defined "agent", in part, as one, the details of whose work was subject to his principal's control, and defined "independent contractor", in part, as one, the details of whose work was not subject to his employer's control.

[fol. 197] The defendant contends that these findings are without support in the evidence:

The evidence shows that the Belt, a Texas corporation, received its charter in 1905 and that all of its stock was subscribed by four railroad corporations, each subscribing for 25% of the whole. Two of these, namely, the Beaumont, Sour Lake & Western and the St. Louis, Brownsville & Mexico, were adjudged liable to the plaintiff as we have stated, and by the Trustee are appellants here. The other corporation adjudged liable to plaintiff, namely, the New Orleans, Texas & Mexico, has never owned any of the Belt's stock but does own all, or approximately all, of the stock of the two corporations just named. Another of the subscribing corporations, the Gulf, Colorado & Sante Fe Railway Company, continues to own its original stock; but the stock subscribed by the fourth company, the Trinity & Brazos Valley Railroad Company, was owned at the time of the plaintiff's injury by two other railroad corporations which were a part of the Rock Island System. These were The Fort Worth & Denver and the Chicago, Rock Island and

Pacific. The plaintiff does not question the legality of the Belt's incorporation or the right of the proprietary lines to own the Belt's stock.

The proprietary lines have exercised their right as stockholders to elect the Belt's board of directors. When the plaintiff was hurt, this board had eight members and each of the proprietary lines (treating the Rock Island lines as one) had elected two members of this board. All of these directors were officers of, or were affiliated in some way with, the corporations which elected them, and three of these eight directors were the President and the two Vice-Presidents of the Belt. Some of the subordinate officers of some of the proprietary lines had served at times as officers of the Belt while they were also officers of proprietary lines, but the evidence does not show that this was true of all of [fol. 198] the Belt's officers, and it was not true of the Belt's subordinate employees conducting the switching operations of the Belt. For instance, Magee, the yard master, said that he was the Belt's employee, and the Belt had made contracts with unions concerning union members who worked for it.

According to the evidence in this case, the Belt has been maintained in form as, and operated in form as, a separate corporation. Thus it acquired, by lease or purchase, and still owns the terminal grounds and tracks at the Union Depot, and it erected and still owns this depot. The funds for its original acquisitions were advanced by the proprietary lines, but the Belt reimbursed these companies from the proceeds of a $5,000,000 bond issue which it sold to the public. The Belt, acting through its own officers and an executive committee of its board of directors made up of some of these directors, employs, pays, disciplines and discharges its own employees and determines the claims of said employees, and has made contracts with various unions concerning its employees who are members of said unions. We have mentioned instances of persons being at the same time officers of the Belt and of a proprietary line. There is nothing to show that these persons were not freely appointed by officers of the Belt acting on their own discretion. The Belt operates twenty-two diesel locomotives, at least some of which it owns, and owns and leases numerous other items of equipment used in its business. It employs

a purchasing agent, and its purchases are made pursuant to authority granted by the executive committee of the Belt's Board of Directors. The Belt has in effect its own tariffs, approved by the Interstate Commerce Commission and by the Texas Railroad Commission, of the charges it makes to railroads other than its proprietary lines (and lines whose charges are controlled by contract) for switching operations. The principal part of the Belt's business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees. [fol. 199] The evidence so far stated shows that the proprietary lines did nothing more than what stockholders are authorized to do, and the evidence relied upon by the plaintiff to sustain his contention that the Belt was no more than an instrumentality or department of the proprietary lines seems to us to go no further. This evidence, with our comments thereon, consists of the following matters:

(1) In the contract between the Belt and its proprietary lines, in force when the plaintiff was hurt, the Belt agreed, on the written demand of any of the proprietary lines, to dismiss any officer or employer of the Belt which said proprietary line deemed incompetent, negligent or guilty of unfairness or discrimination. This provision respects the corporate identity of the Belt; it is the Belt, not the complaining stockholder, which is to discharge the employee. Furthermore, it is to be borne in mind that the Belt is the Houston terminal of it (sic) proprietary lines and that the Belt performs all of the switching services at Houston required by its proprietary lines. According to the evidence in this case, this provision of the contract seems to be proper as one for the protection of the proprietary lines. We have not considered the question, whether the complaining proprietary must have some basis in fact for its demand.

(2) The application of the Belt and its proprietary lines to the Interstate Commerce Commission for authority to perform certain acts contains statements that the proprietary lines *control* the Belt. The Commission's opinion describes the service rendered by the Belt and states that "such service at present is performed by the Belt for the

proprietary carriers as their *agent*" under an agreement which was the one in force when plaintiff was hurt. The agreement between the Belt and its proprietary lines which this opinion of the Interstate Commerce Commission approved (and which supplanted the agreement in force when the plaintiff was hurt) refers to the proprietary lines and [fol. 200] two others as "using lines" and provides that the Belt shall perform service for these lines "as agent" for said lines. The plaintiff also proved the title of a section of this contract but did not prove the contract provision itself.

All of the statements we have referred to are in general terms and there is nothing in addition to the expressions themselves which defines them. It does not appear that any question or issue arose in the Interstate Commerce Commission concerning the nature of the Belt's agency or the proprietary lines' control, or that the parties had in mind, or that the Commission was required to make, any distinction between servant and independent contractor. These general statements respecting *agency* and *control* are consistent with the evidence showing how the Belt was owned and operated. As stockholders, the proprietary lines did have a power of control over the Belt, and since the Belt actually did all of the switching of cars at Houston for the proprietary lines it was in a sense their agent for that purpose, and in this sense the proprietary lines *used* the Belt and its facilities, as they did when they ran their passenger trains into the Union Depot. Furthermore, the term "agent" as used in these expressions is only a legal conclusion. So, under all of these circumstances, the evidence which shows how the Belt was actually operated should be given the effect of controlling and explaining the general statements referred to.

(3) The Trustee and the corporations he represents on this appeal were not parties to U. S. v. Houston Belt & Terminal Railway Company, 210 Fed. 2d 421, and, too, the opinion of the Court recognizes the Belt as a separate corporation and terms it a common carrier. The Trustee and the corporations he represents also were not parties to Texas & N. O. R. Co. v. Houston Belt & Terminal Railway Company, 227 S. W. 2d 610, and the difference between servant and independent contractor seems not to have been

involved in that case. Respecting the Belt's contention of [fol. 201] agency in these cases, see the comments in the two paragraphs immediately preceding this. The aid which the Belt has furnished its proprietary lines to give them an advantage over the competing T. & N. O., referred to both in the decision last cited and in the testimony of the witness Schill, indicates an association or joint action more strongly than an agency, actual or constructive. It is not necessarily proof of domination that a corporation gives a preference to its own stockholders.

(4) The Belt operates at a deficit and this the proprietary lines pay. Too, no extra charge to a shipper of freight is made by a proprietary line for the switching service performed by the Belt, nor does the Belt charge the proprietary lines the rate fixed by its tariff for its services. Instead, the net expense of the Belt, that is, the deficit, is determined each month and is then divided among the proprietary lines according to the extent of the service rendered each line by the Belt. Thus the division is not arbitrary, and the way in which it is made and the sums owed are paid respects the separate identity of the Belt. It is the Belt which determines the sum each line is to pay and the Belt renders each line a bill for its part and collects this sum. The circumstances referred to in this paragraph on which plaintiff relies might have more weight in connection with other circumstances showing a disregard of the Belt's identity, but considered alone these various arrangements are such as the Belt might reasonably make with its own stockholders and yet continue its separate existence. After all, if the Belt charge full tariff and make a profit, this goes back to the ones who paid it—unless a tax be first deducted. We are assuming that the arrangement violates no rule of law and does not deprive the Belt of assets needed to pay its obligations, including one such as plaintiff's judgment.

These various matters relied on by the plaintiff to prove the Belt only an instrumentality seem to us to support the [fol. 202] findings to Issues 3 and 4 no more when considered together than when considered separately. See

Friedman v. Vandalia Railroad Company, 254 Fed. 292, p. 294.

The real question raised by the plaintiff's contention that the Belt is only an instrumentality of the proprietary corporations is whether the Belt's corporate identity shall be disregarded and the Belt treated as being, in legal effect, no more than a part of the proprietary lines. This the courts will not do merely because the proprietary corporations own all of the Belt's stock (we repeat, the legality of this ownership is unquestioned) nor because, in addition, there are interlocking directorates and some officers in common. For the proprietary corporations to be liable for the plaintiff's injury on the theory propounded by the plaintiff, these corporations must exceed their powers and rights as stockholders and, acting through their own officers, conduct and manage the Belt's affairs instead of leaving these matters to the decision of the Belt's own officers, freely acting as officers of the Belt. In Pullman's Palace Car Company v. Missouri Pacific Railway Company, 29 L. Ed. 499, at p. 502, the court said: "The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the Company, but the Company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive [fol. 203] officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the Directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election at a proper time and in the proper way, of other directors, or by some judicial

proceeding for the protection of its interest as a stockholder. Its rights and powers are those of a stockholder. It is not the corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property." See also: Peterson v. Chicago, R. I. & Pacific Railroad Company, 51 L. Ed. 841; Kingston Dry Dock Company v. Lake Champlain Transportation Company, 31 Fed. 2d 265; Berkey v. Third Avenue Railway Company, 155 N. E. 58, 50 A. L. R. 599; State v. Swift & Company, 187 S. W. 2d 127; Fletcher Cyclopedia Corporations, Sec. 43, p. 155 et seq., Sec. 4878, p. 353.

Doubtless the exercise of control over the subsidiary's affairs which constitutes the latter a mere instrumentality of the stockholder corporations may be proved by circumstances; but the evidence in this case is not sufficient to show that the Belt's proprietary lines exercise such a control over the Belt. We sustain the Trustee's contention, and to this extent we sustain his Points I to V, inclusive. The plaintiff's Counter-point 2 is overruled.

The plaintiff contends further that it is not material whether the Belt was an independent contractor or in legal effect a mere servant because, it is argues (sic), the plaintiff's employers had delegated to the Belt the performance of an absolute and non-delegable duty which they owed the plaintiff as their employee. In plaintiff's first counterpoint, this non-delegable duty is identified as one to furnish a safe place to work, although with this the plaintiff has coupled another matter which we deem a separate ground of liability. We agree with the defendant that no violation of the duty to provide a safe place to [fol. 204] work was proved. There is no evidence of any defect in the plaintiff's car, or in the track over which it moved, or for that matter in the equipment involved in the moving of this car. It was the negligent performance of the switching operation, the conduct or (sic) one or more members of the switching crew, which caused the plaintiff's injury. Labatt's Master & Servant states as follows the general rule of decision before the enactment of statutes affecting this rule (particularly those concerned with the fellow servant rule and the matter of assumption of risk):

"All the authorities are agreed as to the general proposition that a master who has furnished a reasonably safe place to work in—can not be held liable to a servant whose co-servant has, by his negligence, rendered that place—unsafe, without the master's fault or knowledge." Section 1515, p. 4540, 2nd Edition. For Texas decisions, see: Galveston, H. & S. A. Ry. Co. v. Waldo, 119 Tex. 377, 29 S. W. 2d 323; San Antonio Brewing Ass'n v. Sievert, 182 S. W. 389; Wells Fargo & Co. v. Page, 68 S. W. 528. Also see: 29 Tex. Jur. 189, Sec. 104; 35 Am. Jur. 784, Sec. 359; 56 C. J. S. 1111, Sec. 333, C. (1) and p. 1114, Sec. c. (3).

However, the argument under the plaintiff's first counterpoint, and the counterpoint itself, involve another ground of liability, namely, a delegation by the Trustee's corporations to the Belt of the performance in part of franchises which the State of Texas has granted the Trustee's corporations. The right of frnachise (sic) said to be performed by the Belt is the switching of cars. The City of Houston is one of the points to and from which the Trustee's corporations and the other proprietary lines carry passengers and freight, and these passengers are delivered and taken up at the Belt's depot, and the carriage of freight into and out of Houston also involves the use of the Belt's facilities. We infer that the Trustee's corporations and the proprietary lines take their trains into and out of the Belt's tracks, but all switching of cars at Houston, both pas- [fol. 205] senger and freight, for the Trustee's corporations and for the proprietary lines is performed by the Belt. In this sense it may be said that the Belt is performing, in part, a service which the other railroad corporations mentioned were enfranchised to perform.

However, as we have stated, the plaintiff was injured in a switching operation, and this operation occurred and plaintiff was injured on the Belt's own property, not on property belonging to any of the Trustee's corporations, and was performed by the Belt's own employees, operating the Belt's equipment.

Furthermore, we have held that the Belt is to be treated as a corporation separate and distinct from the Trustee's corporations, and we have mentioned the Belt's tariff of

charges, approved by Interstate Commerce Commission and Texas Railroad Commission.

Still further, the plaintiff does not question the legality of the agreement under which the Belt switches cars for the Trustee's corporations, or the legality of this service itself.

All this being true, we shall have to deal with the plaintiff's contention on the assumption that the Belt and its switching service were authorized by law. The exact date when the Belt was incorporated was not proved, but if it received its charter in 1905 there was, in Subdivisions 21 and 53 of Chapter 130, Acts 1897, and in Chapter 109, Acts 1905, authority for the creation of such a corporation as the Belt appears to be, performing services such as the Belt has performed. And also see Subdivisions 67 and 72 of Art. 1302 and see Art. 6549, R. S. 1925.

It follows, then that the Trustee's corporations and the other proprietary lines could lawfully delegate to the Belt such performance of their franchises as the switching service of the Belt involved. For it was to perform such [fol. 206] services that the Legislature authorized the creation of such a corporation as the Belt appears to be; the Belt was exercising its own franchise in switching the plaintiff's car.

And, too, if the Belt can be a separate corporation and acquire, own and operate its system of tracks and depot, and if it can make a contract, all of which it evidently has lawful authority to do, it must have the right to stipulate for the powers of an independent contractor. In fact, the Belt's control of its tracks and its switching operations would seem to be necessary to the safety of every one using those tracks; and then, the Belt's officers must consider the possibility of the Belt being liable for what occurs on those tracks.

All of these railroad corporations, including the Belt, were subject to the Texas Railroad Commission and the Interstate Commerce Commission, each of these bodies having exercised jurisdiction over the Belt to the extent, at least, of approving its tariff of switching charges; and the absence of any statute specifically regulating liability is deemed immaterial. See: Missouri P. R. Co. v. Watts,

63 Tex. 549; Gulf, C. & S. F. Ry. Co. v. Miller, 98 Tex. 270, 83 S. W. 182; H. E. & W. T. Ry. Co. v. Anderson, 120 Tex. 200, 36 S. W. 2d 983; Broughton v. Gulf C. & S. F. Ry. Co., 186 S. W. 354. We think that the plaintiff has shown no ground for holding that the Balt's (sic) capacity as independent contractor in switching plaintiff's car should be disregarded.

Plaintiff's counterpoint 1 and the contentions made thereunder are denied.

These comments adjudicate the contentions made by the plaintiff in support of the judgment and it is unnecessary to discuss other contentions made by the Trustee. But all of the facts pertaining to the plaintiff's contentions respecting non-delegable duty are undisputed and we are not satisfied that the petition, in the absence of an excep- [fol. 207] tion, is insufficient to support these contentions. Therefore, we have decided these contentions on their merits. Since our conclusions require a reversal of the trial court's judgment, that judgment is hereby reversed, and it appearing that the cause has been fully developed judgment is rendered that plaintiff take nothing against the Trustee and the corporations he represents on this appeal.

/s/ Charles B. Walker, Associate Justice.

[File endorsement omitted]

[fol. 208] IN THE COURT OF CIVIL APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS, AT BEAUMONT

[Title omitted]

APPELLEE'S MOTION FOR REHEARING—
Filed November 14, 1956

TO THE SAID HONORABLE COURT:

Now comes PARRIS SINKLER, appellee in the above entitled and numbered cause, and respectfully moves the Court to set aside the judgment of this Court rendered on November 1, 1956, reversing and rendering the judgment of the District Court, and to grant him a rehearing and

render judgment in his favor, and as grounds therefor would respectfully show:

1. The Court erred in holding, in direct conflict with the decision of the Supreme Court in *Gulf, Colorado & Sante Fe Railway Company* v. *Shelton*, 96 Tex. 301, 72 S. W. 165, that the appellant was not liable to appellee for the negligence of the switching crew used by appellant in Houston.

2. The Court erred in holding that on the occasion in question the crew switching the car in which appellee was working was doing so "pursuant to a contract between the Belt and the corporations represented by the Trustee which purported to make the Belt an independent contractor for the purpose, among other matters, of and while switching cars, including the plaintiff's car, of the other parties" because there is no evidence of any such contract in this record.

3. The Court erred in holding that the uncontradicted evidence showed that on March 30, 1949 Houston Belt & Terminal Railway Company was switching the car in question in the capacity of an independent contractor, and in this setting aside the jury's answer to Special Issue No. 4.

4. The Court erred in holding that there was no evidence in this record that Houston Belt & Terminal Railway Com- [fol. 209] pany was acting as agent of the appellant on the occasion in question, and in thus setting aside the jury's answer to Special Issue No. 3.

5. The Court erred in holding that appellant could delegate to Houston Belt & Terminal Railway Company the performance of a function of transportation which the appellant, as a common carrier by railroad, was bound to perform under the provisions of 49 U. S. C., section 1, paragraphs (3), (4) and (18) in such a way as to relieve himself of his liability to appellee under the Federal Employers Liability Act (45 U.S.C., sections 51 et seq.).

6. The Court erred in holding that the fact that the appellant and Houston Belt & Terminal Railway Company were subject to the jurisdiction of the Railroad Commission of Texas and the Interstate Commerce Commission im-

plied an express approval by either of those bodies of the arrangement by which the Belt's switching crew performed the appellant's switching at Houston and thus relieved the appellant of his liability to appellee under the Federal Employers Liability Act for the negligence of said switching crew.

7. The Court erred in holding that the appellant, by a contract or arrangement with Houston Belt & Terminal Railway Company, can enable himself to avoid his liability to appellee in violation of the terms of section 5 of the Federal Employers Liability Act (45 U. S. C., section 55).

Wherefore, premises considered, appellee respectfully prays that this motion be granted, that the judgment of the Court heretofore rendered on November 1, 1956 be set aside and that judgment be here rendered affirming in all things the judgment of the District Court.

Kelley & Ryan, 666 Gulf Building, Houston 2, Texas; Smith & Lehmann, 505 Scanlan Building, Houston 2, Texas, By /s/ C. O. Ryan, Attorneys for Appellee.

[fol. 210] Copies of the above motion have been mailed to the attorneys of record for the appellant, Messrs. Woodul, Arterbury & Wren, Bank of the Southwest Building, Houston 2, Texas, and Messrs. Hutcheson, Taliaferro & Hutcheson, Esperson Building, Houston 2, Texas.

/s/ C. O. Ryan, Attorney for Appellee.

[File endorsment omitted]

APPELLEE'S MOTION FOR A REHEARING OVERRULED—November 28, 1956

R. L. Murray, Chief Justice, Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas.

[fol. 211] In the Court of Civil Appeals,
Ninth Supreme Judicial District

Cause No. 6002

Guy A. Thompson, Trustee, et al., Appellants,

v.

Parris Sinkler, Appellee.
from Harris County; appellee's motion is overruled

Order, Made November 28, 1956, Overruling Motion for a Rehearing

I, Elizabeth LeBlanc, Clerk of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas, hereby certify that the above contains a true and correct copy of the order overruling the motion for a rehearing and the respective date thereof in the above numbered and styled cause.

Witness my hand and the seal of said Court, this the 21st day of March, A. D. 1957.

Elizabeth LeBlanc, Clerk.

[fol. 212] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 213] In the Supreme Court of Texas

Parris Sinkler, Petitioner,

v.

Guy A. Thompson, Trustee, Et Al, Respondent.

No. A 6167

R. H. Kelley, J. Edwin Smith, C. O. Ryan, Attorneys for Petitioner.

Of Counsel: Kelley & Ryan, 666 Gulf Building, Houston 2, Texas; Smith & Lehman, 505 Scanlan Building, Houston 2, Texas.

Filed:

December 27, 1956, Elizabeth LeBlanc, Clerk, Court of Civil Appeals, Ninth Supreme Judicial District, Beaumont, Texas.

Filed in Supreme Court of Texas.

January 7, 1957, Geo. H. Templin, Clerk.

APPLICATION FOR WRIT OF ERROR

* * * * * * *

[fol. 214] TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF THE CASE

This is an action under the Federal Employers Liability Act (45 U. S. C., sections 51 et seq.) by petitioner, Parris Sinkler, against respondent Guy A. Thompson, in his capacity as trustee of various debtor railroads. The opinion of the Court of Civil Appeals correctly states, in general, the nature and result of the suit, but the opinion does not give a clear picture of the facts and is confusing and inaccurate in several particulars which will be noticed at length hereinafter.

GROUNDS OF JURISDICTION OF THE SUPREME COURT.

The Supreme Court has jurisdiction of this case under subdivision 2, 3 and 6 of Article 1728.

Under section 2, the holding of the Court of Civil Appeals that respondent is not liable for the negligence of the switching crew which injured petitioner is directly contrary to the holding of the Supreme Court in *G. C. & S. F. Ry. Co.* v. *Shelton*, 96 Tex. 301, 72 S. W. 165, that a railroad is responsible for the negligence of a switching crew to whom it entrusts performance of its switching operations, regardless of the fact that the crew members are employees of another railroad.

[fol. 215] Under section 3, proper disposition of this cause involves construction of the Federal Employers Liability Act (45 U. S. C., sections 51 and 55).

Points of Error

Point One

The Court of Civil Appeals erred in holding, in direct conflict with the decision of the Supreme Court in G. C. & S. F. Ry. Co. v. Shelton, 96 Tex. 301, 72 S. W. 165, that the respondent was not liable to petitioner for the negligence of the switching crew used by respondent in Houston.

Point Two.

The Court of Civil Appeals erred in holding that respondent could delegate to Houston Belt & Terminal Railway Company the performance of a function of transportation which the respondent, as a common carrier by railroad, was bound to perform under the provisions of 49 U. S. C., section 1, paragraphs (3), (4) and (18), in such a way as to relieve himself of his liability to petitioner under the Federal Employers Liability Act (45 U. S. C., sections 51 et seq.).

Point Three.

The Court of Civil Appeals erred in holding that the facts that the respondent and Houston Belt & Terminal Railway Company were subject to the jurisdiction of the Railroad Commission of Texas and the Interstate Commerce Commission implied an express approval by either of those bodies of the arrangement by which the Belt's switching crew performed the respondent's switching in Houston and thus relieved the respondent of his liability to petitioner under the Federal Employers Liability Act for the negligence of said switching crew.

[fol. 216] ### *Point Four.*

The Court of Civil Appeals erred in holding that the respondent, by a contract or arrangement with Houston Belt & Terminal Railway Company, can enable himself to avoid his liability to petitioner in violation of the terms of section 5 of the Federal Employers Liability Act (45 U. S. C., section 55).

Point Five.

The Court of Civil Appeals erred in holding that on the occasion in question the crew switching the car in which petitioner was working was doing so "pursuant to a contract between the Belt and the corporations represented by the trustees which purported to make the Belt an independent contractor, for the purpose, among other matters, of and while switching cars, including the plaintiff's car, of the other parties," because there is no evidence of any such contract in this record.

Point Six.

The Court of Civil Appeals erred in holding that the uncontradicted evidence showed that on March 30, 1949, Houston Belt & Terminal Railway Company was switching the car in question in the capacity of an independent contractor, and in thus setting aside the jury's answer to Special Issue No. 4.

Point Seven.

The Court of Civil Appeals erred in holding that there was no evidence in this record that Houston Belt & Terminal Railway Company was acting as agent of the respondent on the occasion in question, and in thus setting aside the jury's answer to Special Issue No. 3.

[fol. 217] Conclusion

The opinion of the Court of Civil Appeals simply fails to deal with the main question in this case and attempts to ignore the controlling authorities. The respondent's liability to petitioner rests upon principles long antedating the Federal Employers Liability Act, and that Act not only expressly reaffirms the employer's traditional liability in this kind of case, but expressly forbids the attempted avoidance of that liability by contract. The judgment of the trial court was clearly right and that of the Court of Civil Appeals clearly wrong.

Wherefore, premises considered, petitioner respectfully prays that this application for writ of error be granted,

that the judgment of the Court of Civil Appeals be reversed, and that judgment be here rendered affirming the judgment of the District Court.

Respectfully submitted,

/s/ R. H. Kelley, /s/ J. Edwin Smith, /s/ C. O. Ryan, Attorneys for Petitioner.

Of Counsel: Kelley & Ryan, Smith & Lehmann.

[fol. 218] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 219] IN THE SUPREME COURT OF TEXAS

[Title mitted]

PETITIONER'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR.

* * * * * * *

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes Parris Sinkler, Petitioner, and respectfully moves the Court to grant him a rehearing and to grant a Writ of Error in this cause upon each and every one of Points One to Seven, inclusive, set out at length in his Application for Writ of Error filed herein.

ARGUMENT IN SUPPORT OF MOTION FOR REHEARING

In refusing the application for Writ of Error, no reversible error, this Court has left standing a decision of the [fol. 220] Court of Civil Appeals which in effect holds that:

> A common carrier by railroad may turn over a portion of its railroad operations to another corporation and thereby entirely relieve itself oa (sic) liability under the Federal Employers' Liability Act to its own employees, who may be injured in the course of their employment by the negligence of employees of such other corporation.

When a Court of Civil Appeals' opinion has failed to discuss the fundamental legal theory of a litigant's cause, or even to mention the authorities upon which he relies to support his judgment below, the litigant is denied due process of law, unless the Supreme Court looks beyond the opinion to determine what is really at issue. In such a situation, Rule 469 (a) does injustice, for Petitioner's true ground of recovery is not disclosed when the opinion is read.

So, because of what is *not* said in the opinion below, Petitioner is having difficulty catching the Supreme Court's judicial ear. Because of what is *not* said in the opinion of the Court of Civil Appeals, this Court, by its action is overruling or repudiating, *sub silentio,* the following authorities:

A. A previous unanimous decision of this Court when composed of Justices Gaines, Brown and Williams (*G. C. & S. F.* v. *Shelton,* 96 Tex, 301, 72 S. W. 165) Though the authority of that case was repeatedly and expressly urged upon it, the Court of Civil Appeals did not even mention, much less discuss, its holding, notwithstanding that the following language of the Supreme Court in that case directly supports Petitioner's theory of recovery:

> *"Under this state of facts the men of the switching crew were equally the servants of both com-* [fol. 221] *panies, and the plaintiff in error was liable for that action to the same extent as if they had been employed by it."* (Emphasis ours).

So far as counsel are aware, this is the first time that any court in this State has expressly departed from a rule of law laid down by what is generally conceded to have been the ablest Court to sit in Texas in the present Century. While such an unprecedented action may be proper, it is extraordinary that it should be taken when the Court of Civil Appeals did not even mention, much less attempt to distinguish, the case being so overruled, and when neither the Respondent nor the Court of Civil Appeals has cited a single case, in point on the facts, which would support the result reached in this case.

B. The express prohibition of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 55), wherein Congress expressly outlawed the device used by Respondent to attempt to avoid its liability under the Act:

> *"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.* * * *". (Emphasis ours).

The Court of Civil Appeals did not even deign to mention this statute, enacted by Congress for the very purpose of protecting those in Petitioner's situation.

C. *Philadelphia, Baltimore & Washington RR. Co.* v. *Schubert*, 224 U. S. 603, 56 L. Ed. 911, wherein Mr. Justice Hughes, speaking for a unanimous court, interpreted the above quoted provision of *45 U. S. C. A.*, Sec. 55, as follows:

> [fol. 222] *"The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."*

Again, in the opinion below, there is no reference whatever to this case or to the statute which it interpreted.

Conclusion

Though Your Honors have, under Rule 469 (a) read the opinion of the Court of Civil Appeals, the fundamental law question involved in this case cannot be discerned therfrom (sic). Notwithstanding that Judge Walker's opinion reaches a result in direct conflict with *G. C. & S. F.* v. *Shelton, supra*, and the express prohibition of *45 U. S. C. A.*, Sec. 55, as interpreted by Mr. Justice Hughes, in *Philadelphia, Baltimore & Washington R. R.* v. *Schubert, supra*, he neither discusses nor even mentions any of these authorities, nor does he treat in any way the law points raised by them.

For these reasons Petitioner earnestly urges the reconsideration of the original Application for Writ of Error from the perspective of the *Shelton* case and the applicable Federal Statute. Had the Court of Civil Appeals affirmatively refused to follow either of these authorities, the Supreme Court undoubtedly would have been prompt to grant a Writ of Error, and it is also the Court's duty so to act when the opinion below, by omission and indirection rather than affirmatively, reaches an unjust and wholly untenable result.

Wherefore, premises considered, Petitioner prays that this motion for rehearing and his Application for Writ of Error be granted, and that upon final hearing the judgment of the Court of Civil Appeals be reversed and the [fol. 223] judgment of the District Court affirmed.

Respectfully submitted,

/s/ R. H. Kelley, /s/ J. Edwin Smith, /s/ C. O. Ryan, Attorneys for Petitioner, Parris Sinkler.

Kelley & Ryan, Smith & Lehmann, Of Counsel.

I, Geo. H. Templin, Clerk of the Supreme Court of Texas do hereby certify that the above and foregoing eight (8) pages contain a true and correct copy of Motion for Rehearing on Application for Writ of Error in the case of Parris Sinkler vs. Guy A. Thompson, Trustee, et al., No. A-6167, from Harris County, Ninth District, as the same appears of record now on file in this office.

In Testimony Whereof, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 19th day of March, 1957.

Geo. H. Templin, Clerk, /s/ Garson R. Jackson, by Garson R. Jackson, Deputy.

[fol. 224] IN THE SUPREME COURT OF TEXAS

[Title omitted]

ORDER REFUSING APPLICATION FOR WRIT OF ERROR
—February 6, 1957

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the Ninth District and the same being duly considered, and the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the applicant, Parris Sinkler, pay all costs incurred on this application.

IN THE SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING
—February 27, 1957

This day came on to be heard petitioner's motion for rehearing of application for writ of error; and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

[fol. 225] Clerk's Certificate to foregoing paper omitted in printing.

Certified Copy of Judgment of the Supreme Court of Texas on Application for Writ of Error.

(Refused—N.R.E.)

[fol. 234] Triple Certificate to foregoing transcript omitted in printing.

[fol. 235] SUPREME COURT OF THE UNITED STATES

No. 133, October Term, 1957

PARRIS SINKLER, Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY.

ORDER ALLOWING CERTIORARI—October 14, 1957

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Ninth Supreme Judicial District, is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1220~~ 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals For the Ninth Supreme Judicial District of Texas

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ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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OCTOBER TERM, 1956

No._____

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals For the Ninth Supreme Judicial District of Texas

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Petitioner, Parris Sinkler, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, entered in the above entitled case on November 1, 1956.

Citations to Opinions Below

The opinion of the Court of Civil Appeals (R. 195), printed in Appendix "A" hereto, p. 13, is not officially reported but is printed in 295 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing petitioner's application for a writ of error.

Jurisdiction

The judgment of the Court of Civil Appeals was entered on November 1, 1956 (R. 207). A timely motion for rehearing, filed on November 14, 1956, was overruled on November 28, 1956 (R. 210). Petitioner's application for writ of error to the Supreme Court of Texas, timely filed on December 27, 1956 (R. 212) was refused, no reversible error, on February 6, 1957, and a timely motion for rehearing on that application was overruled on February 27, 1957 (R. 224). The Court of Civil Appeals thus became, in this case, the highest court of the State in which a decision could be had. *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because the petitioner's cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U.S.C., Sections 51, et seq. and because the Court of Civil Appeals has decided a question of substance under that Act not heretofore determined by this Court and decided it in a way probably not in accord with applicable decisions of this Court.

Questions Presented

All of the switching operations of respondent railroad and its predecessor in title and responsibility, Guy A. Thompson, Trustee (R. 228) at Houston, Texas were performed by Houston Belt & Terminal Railway Company (R. 109), a corporation affiliated with and partially owned by respondent (R. 107). Petitioner, while engaged in the performance of his duties as an employee of respondent's said predecessor, Guy A. Thompson, Trustee, was injured by the negligence of a switching crew handling the car in which petitioner was working (R. 52). For convenience,

both respondent and Thompson, Trustee, will be referred to hereinafter as "respondent". The questions presented are:

1. Whether respondent can exempt itself from liability under the Federal Employers Liability Act, 35 Stat. 65, 66, 45 U.S.C., Section 51, et seq., by delegating the performance of its switching operations to a terminal company partially owned and effectively controlled by it.

2. Whether the "necessary operation and effect" of respondent's delegation of its switching operations to Houston Belt & Terminal Railway Company was to defeat "the liability which the statute was designed to enforce" within the meaning of this Court's interpretation of Section 5 of the Federal Employers Liability Act, 35 Stat. 66, 45 U.S.C., Section 55, in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603, 613.

3. Whether respondent is liable to petitioner for the negligence of a switching crew of a terminal company to which respondent has entrusted the performance of its switching operations, said operations being a portion of its function of transportation, which it is obliged to perform under the Interstate Commerce Act, Section 1, paragraphs (3), (4) and (18), 41 Stat. 474, 49 U.S.C., Section 1 (3), (4) and (18).

4. Whether the Court of Civil Appeals in this case had the power to reverse the trial court's judgment for the petitioner, which was based upon an express jury finding that Houston Belt & Terminal Railway Company was acting as respondent's agent in performing the switching operation in which petitioner was injured. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 1 L. Ed. 2d 404, 407-408.

Statutes Involved

The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sections 51 and 55, and paragraphs (3), (4) and (18) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C., Section 1 (3), (4) and (18). They are printed in Appendix "B" *infra*, pp. 28-31.

Statement

Petitioner was the Negro cook on the private car assigned to respondent's General Manager (R. 43). On March 30, 1949, the car, carrying petitioner and the General Manager among others, returned to Houston from a trip (R. 49). While it was being switched from one track to another in the Union Station at Houston, and while petitioner was engaged in the performance of his duties as a cook, the car was slammed violently into another car and petitioner was severely injured (R. 52). There is no question on appeal about the negligence of the switching crew (R. 33).

The switching crew were on the payroll of Houston Belt & Terminal Railway Company (hereinafter referred to as "Belt") (R. 76), but the contract in effect between respondent and Belt at the time of the accident provided, in Article III, Section 2 thereof, as follows:

> "If any officer or employee of the Terminal Company shall be deemed by any of the railway companies to be incompetent, negligent, or guilty of unfairness or discrimination, or otherwise unfit for the performance of his duties, such railway company or companies may deliver to the Terminal Company a written demand for the removal of such officer or employee, and thereupon the Terminal Company shall dismiss

such officer or employee within the time mentioned in such demand." (R. 112)

Further, respondent owned 50% of the stock of Belt (R. 107) and appointed four of its eight directors (R. 124). Various employees of respondent also served (sometimes without additional compensation) as employees of Belt (R. 139, 162, 176). There was also evidence that the business of Belt with the railroads other than those owning a part of its stock was conducted in such a way as to advance the interests of the stockholding lines rather than the interest of Belt itself (R. 178-181).

No specific contract for the performance of "switching operations" by Belt, effective at the time of the accident, appears in the record, although there is evidence of a new contract effective June 1, 1950, more than a year after the accident, which, in apparent recognition of the pre-existing situation (R. 160, 192) specifically provides that Belt will perform switching operations for respondent as its *agent* (R. 116, 137).

Petitioner did not consult counsel until more than two years after his accident, and then learned that any action against Belt was barred by the applicable Texas statute of limitations (R. 80-83), but that he could sue his employer within three years from the date of the accident under the Federal Employers Liability Act. Accordingly, he brought this action on March 21, 1952.

The petition in the trial court expressly alleged that respondent was engaged as a common carrier by railroad in commerce between the several states and with foreign nations (R. 4-5) and that the duties of plaintiff in which he was engaged at the time of his injuries affected interstate and foreign commerce directly, closely and substanti-

ally (R. 6), thus alleging a cause of action under 45 U.S.C., Section 51.

Respondent's only defense now material was that Belt acted as an indeupendent contractor in performing switching for respondent, and that respondent was therefore not liable for the negligence of Belt's crew (R. 33-34). As stated above, no contract effective at the time of the accident covering the performance of switching operations was introduced in evidence.

There was general testimony, principally by employees of Belt, about the manner in which its operations were carried on (R. 106-109, 123-138, 186-192). Petitioner introduced evidence of statements made by respondent in proceedings before the Interstate Commerce Commission in *Houston Belt & Terminal Ry. Co. Control, etc.*, Finance Docket 16592, 275 I.C.C. 289 (R. 116-118), portions of the opinion of the Commission in that case (R. 119-120) and a provision in the contract governing the Belt's operations which was approved in that case and placed in effect June 1, 1950 (R. 116) all tending to show that the parties and the Commission regarded and characterized the relationship at all times material here, between respondent and Belt as one of agency.

The trial court, in accordance with Texas practice, elicited from the jury special findings that, upon the occasion in question, Belt was acting as respondent's "agent" and not as an "independent contractor" (R. 25). On these findings, the trial court entered judgment for petitioner (R. 31-32).

The Court of Civil Appeals, in reversing that judgment and rendering judgment for respondent, held in effect that Belt, as a matter of law, was acting as an independent con-

tractor and that respondent was not liable for its negligence (R. 206). Upon motion for rehearing, petitioner expressly pointed out (R. 208-209) the errors of the Court with respect to the proper application of Sections 1 and 5 of the Federal Employers Liability Act. These same points were repeated in the application for writ of error to the Supreme Court of Texas (R. 215-216).

Reasons for Granting the Writ

The judgment of the Court of Civil Appeals, if allowed to stand, effectively deprives railroad employees in petitioner's situation of the protection of the Employers Liability Act, and relegates them to actions for damages under State law against a third party, subject to defenses not available under the Act, and frequently governed by a different statute of limitations. This result is clearly not in accordance with the intent of Congress, and should not be allowed to stand.

The performance of switching operations is a part of the function of transportation which respondent is bound to perform. See Section 1 (3), (4) and (18) of the Interstate Commerce Act, 49 U.S.C., Section 1 (3), (4) and (18). It has uniformly been held that a common carrier by railroad has no power to delegate the performance of any portion of its function of transportation to others in such a way as to relieve itself of liability, especially liability to its employees and passengers. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.A. (N.S.) 1196, 1199; *G. C. & S. F. Ry. Co. v. Shelton*, 96 Tex. 301, 316-17, 72 S.W. 165; *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U.S. 84; *Panhandle & S. F. Ry. Co. v. Crawford* (Tex. Civ. App.), 198 S.W. 1079,

1081; *Peters v. St. Louis, San Francisco Ry. Co.*, (Mo. App.) 131 S.W. 917, 921-922; *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 S.E. 560, 10 A.L.R. 1411, 1417.

In the *Floody* case the plaintiff was the employee of the Omaha company which operated into and out of a union depot in St. Paul owned and controlled by the Union Depot Company, a separate corporation. While riding on one of defendant's engines plaintiff was injured by the negligent operation of a switch by employees of the Depot Company. Defendant there raised precisely the same question as respondent here. The court disposed of that defense as follows:

> "We are satisfied that, as between the Omaha Company and the plaintiff, the company accepted the services of the switchman on that particular occasion to the same extent as though he had been in its employ.
>
> "Conceding that, under the contract between the Union Depot Company and the Omaha Company, the latter was required to take its trains out of the depot over the switches in the manner directed by the switch tenders in the employ of the Union Depot Company, yet that fact did not discharge the railroad company from the contract relation which it assumed as between itself and plaintiff. The test of liability is not determined by the fact that the switch tenders were in the employ and under the control of the Union Depot Company, and that, by virtue of the contract between the switchmen and that company, the relation of *respondeat superior* existed. The Omaha company owed the duty to plaintiff to use all reasonable diligence to carry him safely in its engine out of the depot yards, and it was immaterial to plaintiff whether in so doing defendant operated its train over

its own tracks and switches, over the tracks and switches which it had leased from another company, or under a contract with the Union Depot Company. It was immaterial to plaintiff that the switchmen were paid by the Union Depot Company, and were under its control in operating the switches, if, for the occasion, the Omaha Company chose to avail itself of the services of that company and its employees for the purpose of taking its train out of the depot." (p. 1199 of 13 L.R.A. (N.S.)).

In the *Shelton* case, a passenger rather than an employee was involved, but we consider the principle indistinguishable. There the plaintiff was a passenger on a train of the Gulf, Colorado & Santa Fe Railway Company, and was injured by the negligence of a switching crew of the Atchison, Topeka & Santa Fe which was switching the Gulf car by virtue of an arrangement between the two companies. The Supreme Court of Texas upheld a judgment for the plaintiff in the following language:

"It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, was employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning their joint business at that station. Under this state of facts the men of the switching crew were

> equally the servants of both companies and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it." (pp. 316-317, 96 Tex.)

The general principle involved in this situation is stated as follows in *Restatement of Torts*, Section 428:

> "An individual or a corporation carrying on an activity which can be lawfully carried on under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to work in carrying on the activity."

The opinion of the Court of Civil Appeals neither clearly states nor properly analyzes the fundamental problem here. No authority cited by it is in point, and it neither cites nor discusses any authorities urged by the petitioner in support of his position. No authority, in point on the facts, has been cited by respondent or found by petitioner which would support the judgment of the Court of Civil Appeals.

Even if respondent had in fact made a contractual arrangement with Belt (and no such contract appears in this record) which made Belt an independent contractor in the performance of switching operations and was otherwise sufficient to relieve respondent of its liability to petitioner, such arrangement would be void as to petitioner under the terms of Section 5 of the Employers Liability Act. It has been suggested by respondent below, and is evidently implied by the opinion of the Court of Civil Appeals, that if such an arrangement were one which the parties had charter power to make and were entered into as a normal business arrangement, it would not be subject to Section 5. That argument was long disposed of by this Court in

Philadelphia, Baltimore & Washington R. R. Co. v. Schubert, 224 U.S. 603, 613, in which Mr. Justice Hughes, speaking for an unanimous Court, wrote as follows:

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of Section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

Finally, respondent's defense that Belt was not its agent was submitted to and decided against it by the jury (R. 25). The Court of Civil Appeals undertook to set aside the jury's findings in this regard as being without support in the evidence (R. 201-202). But it is clear that those findings were conclusive, if there was evidence to support them. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. ____, 1 L. Ed. 2d 404, 407-408. The fact that respondent owned 50% of the Belt's stock and appointed four of its directors (R. 107, 124), that various employees of respondent served also, sometimes without additional compensation, as employees of Belt (R. 139, 162, 176), that respondent reserved the right to demand the discharge of any Belt employee obnoxious to it (R. 112), that respondent insisted that Belt's team tracks should not be

open to other railroads in competition with respondent, even though Belt might thereby gain revenue (R. 181-182), that respondent admitted in pleadings filed with the Interstate Commerce Commission that it and the other stockholding lines "jointly controlled" Belt (R. 117-118), that respondent, along with the other stockholding lines of Belt, procured a finding from the Interstate Commerce Commission that the relationship between respondent and Belt at the time of the accident was one of agency (R. 121) in the face of a vigorous protest by the Texas & New Orleans Railroad Company, one of respondent's competitors (275 I.C.C. 289, 311), and the ultimate fact that Belt is nothing more than an instrumentality of respondent and the other stockholding lines, created to perform switching and terminal operations for them at Houston, and wholly incapable of any independent existence (R. 106-108, 124-125, 137-138), all furnish ample support for the jury's verdict. To allow the judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial.

Conclusion

The judgment of the Court of Civil Appeals deprives petitioner and those similarly situated of the protection of the Federal Employers Liability Act. It is in the teeth of Section 5 of the Act, and also operates to deprive petitioner of his right to trial by jury. For all of said reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. KELLEY
J. EDWIN SMITH
Attorneys for Petitioner

APPENDIX "A"

OPINION

(Filed Nov. 1, 1956)

No. 6002

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, ET. AL., Appellants

vs.

PARRIS SINKLER, Appellee

Sinkler, the plaintiff in this action, was an employee of the several railroad corporations represented on this appeal and as defendants below by the Trustee. Plaintiff served as a cook on the car used by an officer of said railroad corporations in the performance of his duties. This car, with plaintiff on board as cook, was brought into the Union Depot at Houston, apparently by one of the Trustee's corporations, the St. Louis, Brownsville & Mexico Ry. Co., as one of a train of cars, and later that day, with plaintiff again on board and again engaged in performing his duties, was moved to another track at this station. This movement was made by employees and property of the Houston Belt & Terminal Railway Company. During the course of the movement, the engineer failed to comply with a signal given him by another member of the switching crew, and in consequence the plaintiff's car was driven against another car with heavy force and the plaintiff was thrown against a part of his own car and injured. The plaintiff subsequently brought this action against the Trustee under the Federal Employers Liability Act, namely,

Sections 51 et seq., Title 45, USCA, to recover damages for these injuries, and no question has been raised concerning the application of this statute to the case. The Houston Belt & Terminal Railway Company was not a party to the suit. The cause was tried to a jury and on the jury's verdict the trial court rendered judgment for the plaintiff against the Trustee for $15,000.00. The Trustee was sued as the representative of five railroad corporations and was adjudged not liable in the case of two. He was adjudged liable as Trustee of the other three, the New Orleans, Texas and Mexico Railway Company, the Beaumont, Sour Lake & Western Railway Company and the St. Louis, Brownsville, and Mexico Railway Company. From the trial court's judgment the Trustee has appealed.

The Houston Belt & Terminal Railway Company was at the time of the plaintiff's injury and still is a corporation, separate and distinct in form from the various railroad corporations represented by the Trustee. The plaintiff was injured on the Belt's track, its property, and his injury, as our statement shows, was caused by the Belt's employees. These employees, again, were subject to, and only to, the direction and control of the Belt's officers and were switching the plaintiff's car pursuant to a contract between the Belt and the corporations represented by the Trustee which purported to make the Belt an independent contractor for the purpose, among other matters, of and while switching cars, including the plaintiff's car, of the other parties. It appears, therefore, that the trial court's judgment is erroneous and must be reversed unless the Belt actually was not an independent contractor or unless the Belt's status as an independent contractor is not material.

It is contended by the plaintiff under his second counterpoint that the Belt was a separate corporation in form only and being so, was no more than an agent of the Trustee's corporations for whose negligence the Trustee would now be liable. And in response to Issue 3, the jury found that in switching the plaintiff's car the Belt was "acting as agent" for the Trustee's corporations adjudged liable, and in response to Issue 4, found that a preponderance of the evidence did not show that the Belt was an independent contractor in switching the plaintiff's car. The trial court defined "agent", in part, as one, the details of whose work was subject to his principal's control, and defined "independent contractor", in part, as one, the details of whose work was not subject to his employer's control.

The defendant contends that these findings are without support in the evidence.

The evidence shows that the Belt, a Texas corporation, received its charter in 1905 and that all of its stock was subscribed by four railroad corporations, each subscribing for 25% of the whole. Two of these, namely, the Beaumont, Sour Lake & Western and the St. Louis, Brownsville & Mexico, were adjudged liable to the plaintiff as we have stated, and by the Trustee are appellants here. The other corporation adjudged liable to plaintiff, namely, the New Orleans, Texas & Mexico, has never owned any of the Belt's stock but does own all, or approximately all, of the stock of the two corporations just named. Another of the subscribing corporations, the Gulf, Colorado & Santa Fe Railway Company, continues to own its original stock; but the stock subscribed by the fourth company, the Trinity & Brazos Valley Railroad Company, was owned at

the time of the plaintiff's injury by two other railroad corporations which were a part of the Rock Island System. These were the Fort Worth & Denver and the Chicago, Rock Island and Pacific. The plaintiff does not question the legality of the Belt's incorporation or the right of the proprietary lines to own the Belt's stock.

The proprietary lines have exercised their right as stockholders to elect the Belt's board of directors. When the plaintiff was hurt, this board had eight members and each of the proprietary lines (treating the Rock Island lines as one) had elected two members of this board. All of these directors were officers of, or were affiliated in some way with, the corporations which elected them, and three of these eight directors were the President and the two Vice Presidents of the Belt. Some of the subordinate officers of some of the proprietary lines had served at times as officers of the Belt while they were also officers of proprietary lines, but the evidence does not show that this was true of all of the Belt's officers, and it was not true of the Belt's subordinate employees conducting the switching operations of the Belt. For instance, Magee, the yard master, said that he was the Belt's employee, and the Belt had made contracts with unions concerning union members who worked for it.

According to the evidence in this case, the Belt has been maintained in form as, and operated in form as, a separate corporation. Thus it acquired, by lease or purchase, and still owns the terminal grounds and tracks at the Union Depot, and it erected and still owns this depot. The funds for its original acquisitions were advanced by the proprietary lines, but the Belt reimbursed these companies from the proceeds of a $5,000,000 bond issue which it

sold to the public. The Belt, acting through its own officers and an executive committee of its board of directors made up of some of these directors, employs, pays, disciplines and discharges its own employees and determines the claims of said employees, and has made contracts with various unions concerning its employees who are members of said unions. We have mentioned instances of persons being at the same time officers of the Belt and of a proprietary line. There is nothing to show that these persons were not freely appointed by officers of the Belt acting on their own discretion. The Belt operates twenty-two diesel locomotives, at least some of which it owns, and owns and leases numerous other items of equipment used in its business. It employs a purchasing agent, and its purchases are made pursuant to authority granted by the executive committee of the Belt's Board of Directors. The Belt has in effect its own tariffs, approved by the Interstate Commerce Commission and by the Texas Railroad Commission, of the charges it makes to railroads other than its proprietary lines (and lines whose charges are controlled by contract) for switching operations. The principal part of the Belt's business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees.

The evidence so far stated shows that the proprietary lines did nothing more than what stockholders are authorized to do, and the evidence relied upon by the plaintiff to sustain his contention that the Belt was no more than an instrumentality or department of the proprietary lines seems to us to go no further. This evidence, with our comments thereon, consists of the following matters:

(1) In the contract between the Belt and its proprietary lines, in force when the plaintiff was hurt, the Belt agreed, on the written demand of any of the proprietary lines, to dismiss any officer or employer of the Belt which said proprietary line deemed incompetent, negligent or guilty of unfairness or discrimination. This provision respects the corporate identity of the Belt; it is the Belt, not the complaining stockholder, which is to discharge the employee. Furthermore, it is to be borne in mind that the *Belt is the Houston terminal of its proprietary lines and that the Belt performs all of the switching services at Houston required by its proprietary lines.* According to the evidence in this case, this provision of the contract seems to be proper as one for the protection of the proprietary lines. We have not considered the question, whether the complaining proprietary must have some basis in fact for its demand.

(2) The application of the Belt and its proprietary lines to the Interstate Commerce Commission for authority to perform certain acts contains statements that the proprietary lines *control* the Belt. The Commission's opinion describes the service rendered by the Belt and states that "such service at present is performed by the Belt for the proprietary carriers as their *agent*" under an agreement which was the one in force when plaintiff was hurt. The agreement between the Belt and its proprietary lines which this opinion of the Interstate Commerce Commission approved (and which supplanted the agreement in force when the plaintiff was hurt) refers to the proprietary lines and two others as "using lines" and provides that the Belt shall perform service for these lines "as agent" for said lines. The plaintiff also proved the title of a section of this contract but did not prove the contract provision itself.

All of the statements we have referred to are in general terms and there is nothing in addition to the expressions themselves which defines them. It does not appear that any question or issue arose in the Interstate Commerce Commission concerning the nature of the Belt's agency or the proprietary lines' control, or that the parties had in mind, or that the Commission was required to make, any distinction between servant and independent contractor. These general statements respecting *agency* and *control* are consistent with the evidence showing how the Belt was owned and operated. As stockholders, the proprietary lines did have a power of control over the Belt, and since the Belt actually did all of the switching of cars at Houston for the proprietary lines it was in a sense their agent for that purpose, and in this sense the proprietary lines *used* the Belt and its facilities, as they did when they ran their passenger trains into the Union Depot. Furthermore, the term "agent" as used in these expressions is only a legal conclusion. So, under all these circumstances, the evidence which shows how the Belt was actually operated should be given the effect of controlling and explaining the general statements referred to.

(3) The Trustee and the corporations he represents on this appeal were not parties to U. S. v. Houston Belt & Terminal Railway Company, 210 Fed. 2d 421, and, too, the opinion of the Court recognizes the Belt as a separate corporation and terms it a common carrier. The Trustee and the corporations he represents also were not parties to Texas & N. O. R. Co. v. Houston Belt & Terminal Railway Company, 227 S.W. 2d 610, and the difference between servant and independent contractor seems not to have been involved in that case. Respecting the Belt's con-

tention of agency in these cases, see the comments in the two paragraphs immediately preceding this. The aid which the Belt has furnished its proprietary lines to give them an advantage over the competing T. & N.O., referred to both in the decision last cited and in the testimony of the witness Schill, indicates an association or joint action more strongly than an agency, actual or constructive. It is not necessarily proof of domination that a corporation gives a preference to its own stockholders.

(4) The Belt operates at a deficit and this the proprietary lines pay. Too, no extra charge to a shipper of freight is made by a proprietary line for the switching service performed by the Belt, nor does the Belt charge the proprietary lines the rate fixed by its tariff for its services. Instead, the net expense of the Belt, that is, the deficit, is determined each month and is then divided among the proprietary lines according to the extent of the service rendered each line by the Belt. Thus the division is not arbitrary, and the way in which it is made and the sums owed are paid respects the separate identity of the Belt. It is the Belt which determines the sum each line is to pay, and the Belt renders each line a bill for its part and collects this sum. These circumstances might have more weight in connection with other circumstances showing a disregard of the Belt's identity, but considered alone these various arrangements are such as the Belt might reasonably make with its own stockholders and yet continue its separate existence. After all, if the Belt charge full tariff and make a profit, this goes back to the ones who paid it—unless a tax be first deducted. We are assuming that the arrangement violates no rule of law and does not deprive the Belt of assets needed to pay its obligations, including one such as plaintiff's judgment.

These various matters relied on by the plaintiff to prove the Belt only an instrumentality seem to us to support the findings to Issues 3 and 4 no more when considered together than when considered separately. See Friedman v. Vandalia Railroad Company, 254 Fed. 292, p. 294.

The real question raised by the plaintiff's contention that the Belt is only an instrumentality of the proprietary corporations is whether the Belt's corporate identity shall be disregarded and the Belt treated as being, in legal effect, no more than a part of the proprietary lines. This the courts will not do merely because the proprietary corporations own all of the Belt's stock (we repeat, the legality of this ownership is unquestioned) nor because, in addition, there are interlocking directorates and some officers in common. For the proprietary corporations to be liable for the plaintiff's injury on the theory propounded by the plaintiff, these corporations must exceed their powers and rights as stockholders and, acting through their own officers, conduct and manage the Belt's affairs instead of leaving these matters to the decision of the Belt's own officers, freely acting as officers of the Belt. In Pullman's Palace Car Company v. Missouri Pacific Railway Company, 29 L. Ed. 499, at p. 502, the court said: "The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the Company, but the Company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the govern-

ing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the Directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election at a proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and powers are those of a stockholder. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property." See also: Peterson v. Chicago, R.I. & Pacific Railroad Company, 51 L. Ed. 841; Kingston Dry Dock Company v. Lake Champlain Transportation Company, 31 Fed. 2d 265; Berkey v. Third Avenue Railway Company, 155 N.E. 58, 50 A.L.R. 599; State v. Swift & Company, 187 S.W. 2d 127; Fletcher Cyclopedia Corporations, Sec. 43, p. 155 et seq., Sec. 4878, p. 353.

Doubtless the exercise of control over the subsidiary's affairs which constitutes the latter a mere instrumentality of the stockholder corporations may be proved by circumstances; but the evidence in this case is not sufficient to show that the Belt's proprietary lines exercised such a control over the Belt. We sustain the Trustee's contention, and to this extent we sustain his Points I to V, inclusive. The plaintiff's Counter-point 2 is overruled.

The plaintiff contends further that it is not material whether the Belt was an independent contractor or in legal effect a mere servant because, it is argued, the plaintiff's employers had delegated to the Belt the performance of an absolute and non-delegable duty which they owed the plaintiff as their employee. In plaintiff's first counterpoint, this non-delegable duty is identified as one to furnish a safe place to work, although with this the plaintiff has coupled another matter which we deem a separate ground of liability. We agree with the defendant that no violation of the duty to provide a safe place to work was proved. There is no evidence of any defect in the plaintiff's car, or in the track over which it moved, or for that matter in the equipment involved in the moving of this car. It was the negligent performance of the switching operation, the conduct of one or more members of the switching crew, which caused the plaintiff's injury. Labatt's Master & Servant states as follows the general rule of decision before the enactment of statutes affecting this rule (particularly these concerned with the fellow servant rule and the matter of assumption of risk): 'All the authorities are agreed as to the general proposition that a master who has furnished a reasonably safe place to work in—can not be held liable to a servant whose co-servant has, by his negligence, rendered that place—unsafe, without the master's fault or knowledge." Section 1515, p. 4540, 2nd Edition. For Texas decisions, see: Galveston, H. & S.A. Ry. Co. v. Waldo, 119 Tex. 377, 29 S.W. 323; San Antonio Brewing Ass'n v. Sievert, 182 S.W. 389; Wells Fargo & Co. v. Page, 68 S.W. 528. Also see: 29 Tex. Jur. 189, Sec. 104; 35 Am. Jur. 784, Sec. 359; 56 C.J.S. 1111, Sec. 333, C. (1) and p. 1114, Sec. c. (3).

However, the argument under the plaintiff's first counterpoint, and the counterpoint itself, involve another ground of liability, namely, a delegation by the Trustee's corporations to the Belt of the performance in part of franchises which the State of Texas has granted the Trustee's corporations. The right of franchise said to be performed by the Belt is the switching of cars. The City of Houston is one of the points to and from which the Trustee's corporations and the other proprietary lines carry passengers and freight, and these passengers are delivered and taken up at the Belt's depot, and the carriage of freight into and out of Houston also involves the use of the Belt's facilities. We infer that the Trustee's corporations and the proprietary lines take their trains into and out of the Belt's tracks, but all switching of cars at Houston, both passenger and freight, for the Trustee's corporations and for the proprietary lines is performed by the Belt. In this sense it may be said that the Belt is performing, in part, a service which the other railroad corporations mentioned were enfranchised to perform.

However, as we have stated, the plaintiff was injured in a switching operation, and this operation occurred and plaintiff was injured on the Belt's own property, not on property belonging to any of the Trustee's corporations, and was performed by the Belt's own employees, operating the Belt's equipment.

Furthermore, we have held that the Belt is to be treated as a corporation separate and distinct from the Trustee's corporations, and we have mentioned the Belt's tariff of charges, approved by Interstate Commerce Commission and Texas Railroad Commission.

Still further, the plaintiff does not question the legality of the agreement under which the Belt switches cars for the Trustee's corporations, or the legality of this service itself.

All this being true, we shall have to deal with the plaintiff's contention on the assumption that the Belt and its switching service were authorized by law. The exact date when the Belt was incorporated was not proved, but if it received its charter in 1905 there was, in Subdivisions 21 and 53 of Chapter 130, Acts 1897, and in Chapter 109, Acts 1905, authority for the creation of such a corporation as the Belt appears to be, performing services such as the Belt has performed. And also see Subdivisions 67 and 72 of Art. 1302 and see Art. 6549, R.S. 1925.

It follows, then, that the Trustee's corporations and the other proprietary lines could lawfully delegate to the Belt such performance of their franchises as the switching service of the Belt involved. For it was to perform such services that the Legislature authorized the creation of such a corporation as the Belt appears to be; the Belt was exercising its own franchise in switching the plaint.. s car.

And, too, if the Belt can be a separate corporation and acquire, own and operate its system of tracks and depot, and if it can make a contract, all of which it evidently has lawful authority to do, it must have the right to stipulate for the powers of an independent contractor. In fact, the Belt's control of its tracks and its switching operations would seem to be necessary to the safety of every one using those tracks; and then, the Belt's officers must consider the possibility of the Belt being liable for what occurs on those tracks.

All of these railroad corporations, including the Belt, were subject to the Texas Railroad Commission and the Interstate Commerce Commission, each of these bodies having exercised jurisdiction over the Belt to the extent, at least, of approving its tariff of switching charges, and the absence of any statute specifically regulating liability is deemed immaterial. See: Missouri P.R. Co. v. Watts, 63 Tex. 549; Gulf, C. & S.F. Ry. Co. v. Miller, 98 Tex. 270, 83 S.W. 182; H.E. & W.T. Ry Co. v. Anderson, 120 Tex. 200, 36 S.W. 2d 983; Broughton v. Gulf C. & S.F. Ry. Co., 186 S.W. 354. We think that the plaintiff has shown no ground for holding that the Belt's capacity as independent contractor in switching plaintiff's car should be disregarded.

Plaintiff's counterpoint 1 and the contentions made thereunder are denied.

These comments adjudicate the contentions made by the plaintiff in support of the judgment and it is unnecessary to discuss other contentions made by the Trustee. But all of the facts pertaining to the plaintiff's contentions respecting non-delegable duty are undisputed and we are not satisfied that the petition, in the absence of an exception, is insufficient to support these contentions. Therefore, we have decided these contentions on their merits. Since our conclusions require a reversal of the trial court's judgment, that judgment is hereby reversed, and it appearing that the cause has been fully developed judgment is rendered that plaintiff take nothing against the Trustee and the corporations he represents on this appeal.

Charles B. Walker,
Associate Justice

NO. 6002

GUY A. THOMPSON, TRUSTEE, ET AL.

v.

PARRIS SINKLER

JUDGMENT - NOVEMBER 1, 1956

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and such judgment is here rendered as should have been entered by the court below, as follows, to wit:

It is the order, judgment and decree of the court that the judgment of the trial court be reversed and judgment is here rendered that the appellee, Parris Sinkler, take nothing by his suit against Guy A. Thompson, Trustee, and the corporations said trustee represents on this appeal, to wit: New Orleans, Texas and Mexico Railway Company, debtor, The St. Louis, Brownsville and Mexico Railway Company, debtor, and The Beaumont, Sour Lake & Western Railway Company, debtor; that the appellee, Parris Sinkler, pay all costs of this appeal; and this decision be certified below for observance.

APPENDIX "B"

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to

enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (18)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier". The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(18) *Extension or abandonment of lines; certificates required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

IN THE

Supreme Court of the United States

October Term, 1956

No. 6920

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari

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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

IN THE

Supreme Court of the United States

October Term, 1956

No. 1020

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari

Questions Presented

Respondent takes exception to the Statement of Petitioner as to the Questions Presented. The Questions Presented are:

(1) Is Respondent liable under the Federal Employers Liability Act, 35 Stat. 65, 66, 45 U.S.C., Sec. 51, et seq., to its employee for an injury received by the employee, while working in the course and scope of his employment with Respondent, due to the negligence of an independent contractor.

(2) Did the contract between Respondent and Houston Belt & Terminal Railway Company fall within the prohibition of Section 5 of the Federal Employers Liability Act, 35 Stat. 66, 45 U.S.C., Sec. 55.

(3) Was there sufficient evidence to support the jury's finding that Houston Belt & Terminal Railway Company was the Agent of Respondent on the occasion in question.

Statement

Petitioner's statement is substantially correct, save for a few unwarranted conclusions which he drew.

Argument

Petitioner's first reason for the granting of the Writ has been decided adversely to his contention by decisions of this Court of long-standing. The Act itself, 45 U.S.C.A., Section 51, expressly provides that the carrier shall be liable "for such injury . . . resulting . . . from the negligence of any of the officers, agents, or employees of such carrier . . ." The intent of Congress is plain. The carrier is liable to its employees *only for the negligence of its officers, agents or employees.* There is no provision in the Act creating liability on the carrier for the negligent act of Third Parties.

The cases have uniformly adhered to the intention of Congress, as expressed in the plain wording of the Act. In the early case of *Robinson v. Baltimore & O. R. Company* (Sup. Ct., 1915), 237 U.S. 84, 59 L. Ed. 849, this Honorable Court rejected the contention that the Act covered employees of other carriers which were rendering

a service to the carrier. In that case, the precise issue before the Court was whether or not a Pullman Porter, who sustained an injury while working on a train, was an employee of the carrier within the meaning of the Act. The Court, in disposing of this contention, stated (Page 853 of 59 L. Ed.):

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, *and intended to describe the conventional relation of employer and employee.* It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such person among those to whom the Railway Company was to be liable under the Act." (Emphasis ours)

The *Robinson Case, Supra,* was followed by this Court in the case of *Hull v. Philadelphia & Reading Railway Company* (Sup. Ct., 1920), 252 U.S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670. In the *Hull Case, Supra,* the deceased was an employee of the Western Maryland Company, and was engaged in operating a Western Maryland train on a run which was partly on the tracks of the Defendant, Philadelphia & Reading Railway Co. While operating on the tracks of the Defendant, Hull was killed due to the negligence of the Defendant, at a time when his train was stopped pursuant to instructions given by the Defendant. The Plaintiff contended that Hull, at the time he was injured, was an employee of the Defendant. The Court, in rejecting this contention, stated (Page 673 of 64 L. Ed.), as follows:

"We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co., 237 U.S. 84, 94, 59 L. Ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N.C.C.A. 1, that in the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the (480) facts as recited and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It is clear that each company retained the control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and their orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U.S. 215, 226, 53 L. Ed. 480, 485, 29 Sup. Ct. Rep. 252."

The principles applied by this Court in the *Hull Case, Supra,* and the *Robinson Case, Supra,* were applied by this Court in the case of *Linstead v. Chesapeake & Ohio Railway Co.,* (Sup. Ct., 1928), 276 U.S. 28, 72 L. Ed. 453.

In the *Linstead Case, Supra,* this Court upheld a recovery for the claimant because the evidence was sufficient to show that the deceased was doing the work of the Defendant, and that the Defendant had the right of control (Page 456 of 72 L. Ed.).

The rationale and holding of the Supreme Court in the above cases makes it clear beyond doubt that the Federal Employer's Liability Act is applicable only when the negligent party is an officer, agent, or servant of the employing carrier. In the *Robinson Case, Supra,* the Court, speaking through Justice Hughes, specifically said that Congress used the word "employee" in its natural sense. It necessarily follows that the carrier is not responsible for the negligent acts of the employees of an independent contractor, since the employees of the independent contractor are not employees of the carrier within the natural sense of the word "employee". In both the *Hull Case, Supra,* and the *Linstead Case, Supra,* the Court went into great detail to examine whose work was being done by the deceased and who had the right of control. In the *Hull Case, Supra,* the Court found that he was not doing the work of the negligent party and the negligent party did not have the right of control and hence, the Court denied a recovery. In the *Linstead Case, Supra,* the Court felt that the deceased was doing the work of the negligent party, and also that the negligent party had the right of control and hence, it upheld a recovery. In subsequent pages of this brief, we will show that the switching crew in question was not doing Respondent's work and Respondent did not have the right of control. The point we wish to make here is that all three of these cases are directly contrary to Petitioner's position on this point. One case specifically

says there must be an employer-employee relationship and the other two cases hold that there must be an employee relationship - at least temporary. Absent such relationship, there can be no recovery.

Petitioner may contend that the question of assignability or delegation of the functions of a common carrier were not involved in the above cases. Such contention will overlook the salient facts present in those cases. In the *Robinson Case, Supra,* the plaintiff's contract of employment was with the Pullman Company. Certainly his duties on the train were in the furtherance of interstate commerce. The Supreme Court in that instance refused to hold the Act applicable. Such refusal is tantamount to holding that while the work being done is for the ultimate benefit of the Railway Company, still if it is done under the direction and supervision of another master, the doing of such work does not make the man the employee of the carrier. This principle is expressed in the case of *Standard Oil v. Anderson* (Sup. Ct.), 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480.

In the *Hull Case, Supra,* the Western Maryland Co., with whom deceased had his contract of employment, was operating its train, pursuant to a contract over the tracks of the defendant. The plaintiff contended that since the Philadelphia & Reading had the non-delegable duty to operate its road and since Hull, an employee of the Western Maryland, was operating on the road of the Philadelphia & Reading, he was performing a non-delegable duty with the knowledge and assets of the Philadelphia & Reading and hence he was an employee of the Philadelphia & Reading. Such contention is shown at P. 671 of 64 L. Ed. The Court in its opinion ignored this argument and based its

decision on the question of control. Likewise the Court in the *Linstead Case*, *Supra*, based its decision on the question of control. See 72 L. Ed. PPs. 455-6. Accordingly, Respondent submits that both of these cases are directly contrary to Petitioner's position under this point.

Other cases which support Respondent's position on this point are as follows: *Louisville & N. Railway Co. v. Wing's Administratrix* (Kentucky, 1926), 281 S.W. 171; *Wadiak v. Illinois Central Railway Co.*, 208 F. 2d 925; *Gaulden v. Southern Pacific Co.* (1948), 78 F. Supp. 651, Aff'd. 174 F. 2d 1022; *Moleton v. Union Pac. R.R. Co., et al.* (Utah Sup. Ct., 1950), 219 P. 2d 1080, Cert. Den., 340 U.S. 932, 95 L. Ed. 672, 71 Sup. Ct. 495.

The most recent case in point is the *Moleton Case*, *Supra*. In that case the Plaintiff was alleging that he was an employee of the carrier within the meaning of the Act, even though his contract of employment was with the Pacific Fruit Express Company, because he was injured while servicing a car being hauled in a train by the Defendant. The Supreme Court of Utah, after analyzing the facts, concluded that the carrier did not have the right of control, and therefore, denied the claimant a recovery. This Court denied the Petition for a Writ of Certiorari.

The switching of Railway cars in larger cities has become a specialized service which is ordinarily performed by a terminal company and not by the Railroad Company which brings the car into the city. See the cases of *Fort Worth Belt Railway Company v. United States* (Ct. Appeals 1927), 22 F. 2d 795, which sets out the activities of the Fort Worth Belt Railway Company, and *Terminal Railway Association v. U. S.* (St. Ct.), 266 U.S. 18, 69 L. Ed. 150, which describes the activities of the Terminal

Railway Association of St. Louis. In addition thereto, the testimony of the witness Magee, shows that the Interstate Commerce Commission makes a distinction between switching carriers and Line Haul carriers, when he testified that the Houston Belt and Terminal Railway Company is classified as Class I among switching carriers by the Interstate Commerce Commission.

In addition to the foregoing, the Texas Legislature has enacted a provision expressly authorizing the organization of Terminal Railway Companies. See Art. 6549 of *Vernon's Annotated Texas Statutes* which reads, in part, as follows:

> "Terminal railways shall have all the rights and powers conferred upon railroads by Chapters 6 and 7 of this title. . . ."

From the foregoing it will be noted that both the Texas Legislature and the Interstate Commerce Commission recognize the distinction between Terminal Railways and Railroads whose tracks go from city to city. Recognizing this distinction the Texas Legislature has authorized the creation of cororations to perform the services of a terminal railway company. There has been no limitation put upon the power of terminal railway companies to contract with other railroad companies. Likewise Congress has authorized common carriers to contract with one another.

The cases have held, uniformly, that where a railroad company utilizes the services of another company, also a common carrier, for a special service, the employees of the other company are not the employees of the Railroad Company within the terms of the Federal Employer's Liability Act. The *Moleton Case, Supra,* is an example of that

principle. Surely in that case the servicing of the cars which were in the defendant's train was as much a performance of the functions of a common carrier as was the switching of the private Railway car on the occasion in question. Yet the plaintiff, in the *Moleton Case, Supra,* was denied a recovery because the element of agency was lacking. He was working for an independent contractor and hence not an employee of the Railway Company. The *Robinson Case, Supra,* is another example of this principle. Certainly the attending upon passengers, in a passenger train, whether they are Pullman passengers or coach passengers, is as much a performance of the function of a common carrier as was the switching of the car in the instant case. Yet the Court denied a recovery in the absence of facts showing an agency relationship. The *Hull Case* and the *Linstead Case, Supra,* are also examples of this principle. In the *Hull Case, Supra,* the element of control was lacking and hence the Supreme Court denied a recovery while in the *Linstead Case, Supra,* the element of control was present and hence the Supreme Court upheld a recovery. The case of *Wingo's Administratrix, Supra,* is another example. In that case the switching of the cars was as much the function of a common carrier as was the switching of the car in the instant case. In that case the Court upheld a verdict for the plaintiff because the element of control was present.

These cases show clearly that a carrier is not responsible for the acts of the employees of its independent contractor when such contractors are engaged in the performance of switching operations.

The intent of Congress is plain from the language used in the portions of the Interstate Commerce Act cited by

Petitioner (49 U.S.C., Sec. 1 (3), (4), and (18)), that the carrier is authorized to contract with other carriers to furnish a portion of the transportation required by such sections. Why else would Congress provide for a division of fares. Congress certainly did not mean that each carrier had to operate a line to each spot in the nation. Congress meant for the carriers to contract with one another, as was done in the instant case. It would be foolish for each carrier that contracts with the Belt, to have switch tracks all over the City of Houston.

The cases relied upon by Petitioner are either not in point or have been discredited. The Shelton Case *(Shelton v. G.C. & S.F. Ry. Co.*, 96 Tex. 301, 72 S.W. 165) is not in point. In that case there was no evidence, as there is in the instant case, that the company switching the car was doing so as an independent contractor. Respondent urged that distinction between the *Shelton Case*, *Supra*, and the instant case, both in the Texas Court of Civil Appeals and in the Supreme Court of Texas. Both of these Courts agreed with Respondent. It is somewhat presumptuous of Petitioner to urge the *Shelton Case* as being authority for his position in this case, where the *Shelton Case* and this case were passed upon by the same Court, and evidently, that Court did not consider the holding in the instant case to be contra to the holding in the *Shelton Case*.

The reasoning of the other case relied upon by Petitioner *(Floody v. Great Northern Railway Company, et al.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.A. (N.S.) 1196, 1199), was rejected by this Honorable Court in the *Hull Case*, *Supra*.

In the *Hull Case* the plaintiff argued that since the Railway Company had the non-delegable duty of the operation

of its road (citing *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 35 L. Ed. 55), the plaintiff in the *Hull Case* was an employee of the Reading Company since he was performing a nondelegable duty for the Reading Company, citing the case of *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735. This argument is shown at the top outside column on P. 671 of 64 L. Ed. The Supreme Court ignored this contention and decided the case on the element of control. Not even the dissenting opinion considered the contention worthy of mention. It only differed with the majority in that it thought the necessary control was present. Since the reasoning of the *Treadway Case, Supra*, has been discredited by the United States Supreme Court and since the *Flood Case, Supra*, is based upon the same reasoning we respectfully submit that they are not any authority for Petitioner's position in this case.

Similarily the *Peters Case* (131 S.W. 917, Mo. App.), cited on P. 8 of the Petition and the quotation from the Restatement of Torts (cited on P. 10 of the Petition) do not support Petitioner's position. The rule stated there relates to a delegation to a person or firm other than a common carrier. Besides, the *Hull Case, Supra*, the *Moleton Case, Supra*, and the *Robinson Case, Supra*, are contrary to the rule laid down in those authorities when applied to the facts in the instant case.

Section 5 of the Act is quoted on pages 28 and 29 of the petition and provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall * * * be void. * * * " Section 5 is not applicable to this suit. It provides that contracts the

purpose of which is to exempt a carrier from liability created under the Act are void. The Act did not create liability upon the carrier for the negligence of the employees of its independent contractors. The Act only creates liability upon the carrier for the negligence of its "officers, agents and employees." It is not responsible for the acts of its independent contractor. Section 5 only applies in instances where the carrier would be responsible to the employee under the terms of the Act but for a contract or rule. In such instance the contract or rule is void. That isn't the situation in this case where Respondent is not responsible to Petitioner, not because of a contract or rule, but rather because of the legal relationship created by the contract, between Respondent and the Houston Belt & Terminal Railway Company.

In the case relied upon by Petitioner in his petition, *Philadelphia, Baltimore & Washington RR. Co. v. Schubert*, 224 U.S. 603, 56 L. Ed. 911, the court had under consideration a contract between a carrier and its employee which provided that the company should deduct the sum of $2.10 from the employee's wages each month to be placed in a relief fund. The contract further provided that in case of injury the acceptance of benefits from the relief fund would constitute a release and the assertion of a claim or institution of a suit would bar any further payments from the fund. Justice Hughes had this contract before him when he made the remarks quoted on page 11 of the petition. At page 916, the court stated:

> "The statute (45 U.S.C.A. 51) provides that 'every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * resulting in whole or in part from the negligence of any of the officers, agents, or em-

> ployees of such carrier. * * * ' That is the liability which the Act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute."

This Honorable Court will note that Justice Hughes is holding that the contract in question is one of immunity. Manifestly, that isn't even slightly similar to the contract in the instant case. The Petitioner cites not one single case to support his contentions under this point. The cases of *Moleton v. Union Pacific RR Co., Supra*, and *Gaulden v. Southern Pacific Co.*, 78 Fed. Supp. 651 (1948), affirmed 174 F. 2d 1022 support Respondent's position. The fact situations in those cases are very similar to the instant case.

We submit that the record in this case wholly fails to show that the Houston Belt & Terminal Railway Company was used by Respondent as a device to obtain the forbidden end. Just as in the *Moleton Case, supra*, no one concerned with the operation of the Terminal "thought the railroad was performing the services, and merely took on the express terminal company for the purpose of acquiring the use of their employees."

Petitioner's contention that the Belt was acting as Respondent's agent on the occasion in question is not sound. In *Cimorelli v. New York Central Railway Company*

(Ct. Appeals, 6th Cir., 1945), 148 F. 2d 575, the Court stated the applicable question in cases of this nature, to be as follows:

> "Whether Appellee, (the Railway Company) for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Company and had thus divested itself of the right of control, to the extent that it had no longer a legal right to terminate the work or direct it?"

The Court, in the *Cimorelli Case*, went further and set out certain tests by which the answer to the above question could be determined. The Court stated the following to be the tests.

> "One of the tests is who has the right of control over the work being done. Other recognized tests are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the contractor's business, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workmen are employed, the method of payment, whether by time or job, and whether the work is part of the regular business of the employer. The important test is the control over the details of the work reserved by the employer and to what extent the person doing the work is in fact independent in its performance."

These are substantially the same tests as set forth in the other cases cited, supra. In the *Moleton Case*, *Supra*, the Court stated the tests in the following words:

"The Court has considered five elements in determining the question:

(1) the selection and employment of the servant;
(2) the payment of his wages;
(3) the power to discharge the servant;
(4) the power to control his action; and
(5) the person whose work is being done by the servant. Murray v. Wasatch Grading Co., 73 Utah 430, 274 P. 940.

The first four of these, clearly, under the facts of the present case, point to the express company as the responsible employer. As to the fifth, we believe, in this case, that the express company was the one whose work was being done. Of course, the railroad will ultimately benefit from it, but we do not believe that anyone concerned thought the railroad was performing the services, and merely took on the express company for the purpose of acquiring the use of their employees. It is, in a sense, a specialized service which has been recognized as such for years."

We respectfully ask the Court to compare the facts in he instant case with the tests laid down in the *Moleton Case, Supra.* Here the Belt had the right to select and mploy the switchmen. Likewise, here the Belt paid he switchmen, had the right to discharge them, the power o control them, and the switchmen were doing the work f the Belt. The switching of cars was the object for hich the Belt was created, and the switchmen in switchng the car in question, were performing, for the Belt, he very function for which it was created.

Also, we ask the Court to compare the facts in the in- tant case with the tests set out in the *Cimorelli Case, upra.* In the instant case the Belt had the right of conrol. It was the Belt's right to furnish what personnel it

thought necessary, what tools and machinery it thought necessary. Also, the Belt was paid by the job. The amount of remuneration received by the Belt depended upon the number of cars it handled for Respondent. Certainly this is consistent with an independent contractor relationship.

The *Cimorelli Case, Supra*, also stated one of the tests to be whether the work is part of the regular business of the employer. We have demonstrated in the preceding pages of this brief that the switching of railroad cars in larger cities has for many years been done by Terminal Companies. See *Ft. Worth Belt Railway Co. v. U. S., Supra* (22 F. 2d 795) and *Terminal Railway Ass'n. v. U. S., Supra* (266 U.S. 18, 69 L. Ed. 150). This fact is further shown by the testimony of the witness Magee, regarding classification of Railroad Companies by the Interstate Commerce Commission and by the provisions of Vernon's Annotated Civil Statutes (Art. 6549 and Sections 67 and 72 of Article 1302), authorizing the creation of corporations for this very purpose. These factors certainly show that switching in the larger cities, like furnishing and servicing refrigerator cars *(Moleton v. Union Pac., Supra)*, "is, in a sense, a specialized service which has been recognized as such for years." Thus, the Belt, in switching the car in question, was not performing a part of Respondent's work.

As the Court of Civil Appeals points out in its opinion (Pages 13-16 of Petition for Writ of Certiorari), the Belt owns the switch yards and terminal facilities where the accident in question occurred (Page 16 of Petition), employs, pays, disciplines, and discharges its own employees, and determines the claims of said employees, and has made contracts with the various Unions concerning its employees (Page 17 of Petition), owns and leases loco-

motives and other equipment necessary for its business (Page 17 of Petition), employs a Purchasing Agent, and makes purchases pursuant to authority given by its Executive Committee, which is made up of some of the members of its Board of Directors (Page 17 of Petition). The principal part of the Belt's business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees.

The evidence in this case certainly meets all the tests set out by the Court in the *Cimorelli Case, Supra.* Neither Respondent, nor any of its employees had the right to control or direct the switching crew in question. In fact, the contract in effect provided that the Belt was an independent contractor (Page 14 of Petition). The exact wording of the Section is as follows:

> "The Terminal Company shall have the *exclusive management and control* of the *operation, maintenance, repair* and *renewal* of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities . . . The railway companies agree to comply and cause their employees to comply with such rules and regulations."

Clearly, this excerpt which provides that the Belt, and only the Belt, shall have control of the operation of the Terminal, negatives any idea that Respondent had any control whatsoever over the Terminal operations.

The evidence cited by Petitioner as supporting the jury's agency finding, wholly fails to support such finding. The fact that Respondent owned 50% of the Capital Stock, elected four (4) of its Directors and represented to the

Interstate Commerce Commission that it and the other Stockholders "jointly controlled" the Belt, is no evidence of the type of control required to show agency. *Pullman's Palace Car Company v. Missouri Pacific Railway Company*, 29 L. Ed. 499, 502. The Stockholders of every company jointly control the company and elect the Board of Directors. Yet such joint control does not make the corporation the agent of each stockholder. The provision of the contract, whereby the railway companies could request the Belt to discharge an employee who was unfit to perform his duties, is a reasonable provision (*Friedman v. Vandalia Railroad Company* (Ct. App., 1918), (254 F. 292). It is the Belt, not Respondent, who can discharge the employee.

While Respondent may have objected to the Belt switching cars that came into Houston over the lines of the Texas & New Orleans Railroad Company, there is no evidence that the Belt refused to switch such cars. The only vidence is that the Belt would require payment from the consignee of the switching charges. The Belt was not depriving itself of anything, since payment from the consignee was as good as payment from the Texas & New Orleans Railroad Company.

The use by the Interstate Commerce Commission of the word "agent" in its approval of the contract which went into effect in 1950, subsequent to the date of the accident in question, is of no probative value on this issue. The word "agent" is often used to describe independent contractor relationships. *Gaulden v. Southern Pac. Co.* (D.C., 1948), 78 F. Supp. 651, aff'd. 174 F. 2d 1022. It is clear from the excerpt, that the Commission was not concerned with the issue at hand. It made no reference to the traditional tests. Indeed, the Commission does not con-

cern itself with the point at hand. The Commission may have been thinking of an agency relationship within the meaning of the Carmack Amendment (49 U.S.C.A., Sec. 20), where each carrier is the agent of the initial carrier. *Galveston H. & S. A. Ry. Co. v. American Grocery Company* (1931), 36 S.W. 2d 985, 992. But the Federal Employers Liability Act did not use the word "agent" in that sense. It used the word in the conventional sense. *Hull v. Philadelphia & Reading Railway Co., Supra.*

Conclusion

The intent of Congress is plain. In order to hold the carrier liable for injuries to its employees, the carrier or its agent or employees, must have been negligent. The negligent act in the instant case was the act of the Belt, and the Belt only. The fact that Petitioner chose not to sue the Belt should not create liability on the part of Respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Civil Appeals (R. 100-111) is not officially reported but is printed in 295 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing petitioner's application for writ of error.

Jurisdiction

The judgment of the Court of Civil Appeals was entered November 1, 1956 (R. 111). A timely motion for rehearing, filed November 14, 1956, was overruled November 28, 1956 (R. 113). Petitioner's application for writ of error to the Supreme Court of Texas, timely filed December 27, 1956 (R. 115) was refused, no reversible error, February 6, 1957, and a timely motion for rehearing on that application was overruled February 27, 1957 (R. 122). The Court of Civil Appeals thus became, in this case, the highest court of the State in which a decision could be had. *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157. Jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1257(3) because the petitioner's cause of action is under the Federal Employers Liability Act, 35 *Stat.* 65, 45 *U.S.C.*, Sections 51 et seq. and because the Court of Civil Appeals has decided a question of substance under that Act not heretofore determined by this Court and decided it in a way probably not in accord with applicable decisions of this Court.

Questions Presented

All of the switching operations of respondent railroad at Houston, Texas were performed by Houston Belt & Terminal Railway Company (R. 41), a corporation affiliated with and partially owned by respondent (R. 39). Petitioner, while engaged in the performance of his duties as an employee of respondent, was injured by the negligence of a switching crew handling the car in which petitioner was working (R. 29, 30). The questions presented are:

1. Whether respondent can exempt itself from liability under the Federal Employers Liability Act, 35 *Stat.* 65,

66, 45 *U.S.C.*, Section 51 et seq., by delegating the performance of its switching operations to a terminal company partially owned and effectively controlled by it.

2. Whether the "necessary operation and effect" of respondent's delegation of its switching operations to Houston Belt & Terminal Railway Company was to defeat "the liability which the statute was designed to enforce" within the meaning of this Court's interpretation of Section 5 of the Federal Employers Liability Act, 35 *Stat.* 66, 45 *U.S.C.*, Section 55, in *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 613.

3. Whether respondent is liable to petitioner for the negligence of a switching crew of a terminal company to which respondent has entrusted the performance of its switching operations, said operations being a portion of its function of transportation, which it is obliged to perform under the Interstate Commerce Act, Section 1, paragraphs (3), (4) and (18), 41 *Stat.* 474, 49 *U.S.C.*, Section 1(3), (4) and (18).

4. Whether the Court of Civil Appeals in this case had the power to reverse the trial court's judgment for petitioner, which was based upon an express jury finding that Houston Belt & Terminal Railway Company was acting as respondent's agent in performing the switching operation in which petitioner was injured. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370.

Statutes Involved

The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 *Stat.* 65, 66, 53 *Stat.* 1404, 45 *U.S.C.*, Sections 51 and 55, and para-

graphs (3), (4) and (18) of Section 1 of the Interstate Commerce Act, 41 *Stat.* 474, 49 *U.S.C.*, Section 1(3), (4) and (18). They are printed in Appendix "A" *infra*, pp. 21-24.

Statement

Petitioner was employed as cook on the private car assigned to respondent's General Manager (R. 21, 22). On March 30, 1949, the car, carrying petitioner and the General Manager among others, returned to Houston from a trip (R. 26). While it was being switched from one track to another in the Union Station at Houston, and while petitioner was engaged in the performance of his duties as a cook, the car was rammed violently into another car and petitioner was severely injured (R. 29). There is no question on appeal about the negligence of the switching crew (R. 13, 16-18).

The switching crew were on the payroll of Houston Belt & Terminal Railway Company (hereinafter referred to as "Belt") (R. 56, 57). Only two excerpts from the contract between respondent and Belt, in force at the time of the accident, were introduced in evidence, one by petitioner (R. 42, 43) and one by respondent (R. 59). Both of these excerpts, including that offered by respondent, were received in evidence over respondent's objections (R. 42, 43, 59). Neither of these excerpts provides for or even mentions the performance by Belt of switching operations for respondent or anyone else.

A new contract between respondent and Belt went into effect June 1, 1950, more than a year after the accident (R. 44). This contract specifically provided for the performance of freight and passenger switching service by

Belt (R. 62, 64) and further provided that all services performed by Belt for its using lines should be performed by Belt as *agent* for the using lines (R. 44, 47). In its opinion granting the application of respondent, Belt and the other using lines for the approval of this contract effective June 1, 1950 (referred to as the 1948 Operating Agreement (R. 44-45)) the Interstate Commerce Commission specifically recited that switching was then being performed by Belt for the proprietary carriers as their agent (R. 46, 48, 51). The Superintendent of Belt testified that the June 1, 1950 contract had made no actual change in the handling of passenger switching at Houston (R. 81), and this testimony was generally confirmed by the President and General Manager of Belt (R. 100).

Petitioner did not consult counsel until more than two years after his accident, and then learned that any action against Belt was barred by the applicable Texas statute of limitations (R. 35-37) but that he could sue his employer within three years from the date of the accident under the Federal Employers Liability Act. Accordingly, he brought this action on March 21, 1952 (R. 37).

The petition in the trial court expressly alleged that respondent was engaged as a common carrier by railroad in commerce between the several states and with foreign nations (R. 2) and that the duties of petitioner in which he was engaged at the time of his injury affected interstate and foreign commerce directly, closely and substantially (R. 3) thus alleging a cause of action under the Federal Employers Liability Act.

Respondent's only defense now material was that Belt acted as an independent contractor in performing switch-

ing operations for respondent, and that respondent was therefore not liable for the negligence of Belt's crew (R. 16-18).

As stated above, there was no evidence of any contract provision whatever, effective at the time of the accident, covering the performance of switching operations, and respondent at no time attempted to introduce any such evidence. There was general testimony, principally by employees of Belt, about the manner in which its operations were carried on (R. 38-41, 52-64, 73, 75-81, 95-100). Petitioner introduced evidence of (a) statements made by respondent in proceedings before the Interstate Commerce Commission in *Houston Belt & Terminal Ry. Co. Control, etc.*, Finance Docket 16592, 275 I.C.C. 289 (R. 45, 47-48), (b) portions of the opinion of the Commission in that case (R. 46, 50-51) and (c) a provision in the contract governing Belt's operations which the Commission approved in that proceeding and placed in effect June 1, 1950 (R. 44, 46-47). The substance and effect of this evidence is as follows:

In the application filed by respondent and others with the Interstate Commerce Commission it is expressly recited under oath (R. 47-48) that the Belt is jointly controlled through stock ownership by respondent and the other stockholding lines. The opinion of the Commission approving the arrangement proposed by respondent expressly recites that the switching service was then being performed under an agreement dated July 1, 1907 by Belt for its proprietary carriers as their *agent* (R. 50-51). The Commission's opinion also recites (R. 62, 64) that under the proposed contract Belt would perform all freight and passenger switching service. The June 1, 1950 con-

tract itself provided (R. 47) that all services performed by Belt for account of the using lines should be performed by Belt as *agent* for the using lines.

The trial court, in accordance with Texas practice, elicited from the jury special findings that, upon the occasion in question, Belt was acting as respondent's "agent" and not as an "independent contractor" (R. 12). On these findings, the trial court entered judgment for petitioner (R. 14-15).

The Court of Civil Appeals, in reversing that judgment and rendering judgment for respondent, held in effect that Belt, as a matter of law, was acting as an independent contractor, and that therefore respondent was not liable for its negligence (R. 111). Upon motion for rehearing, petitioner expressly pointed out (R. 112-113) the errors of the court with respect to the proper application and effect of Sections 1 and 5 of the Federal Employers Liability Act. These same points were repeated in the application for writ of error to the Supreme Court of Texas (R. 115-117).

SUMMARY OF ARGUMENT

A. Respondent was liable to petitioner for injuries suffered by petitioner in the course of his employment as a result of the negligence of those to whom respondent had entrusted the performance of its switching operations, regardless of the exact legal relationship between respondent and the switching crew. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.S. (N.S) 1196, 1199. Respondent could not delegate the performance

of any portion of its functions as a common carrier in such a way as to relieve itself from liability to its own employees. *Restatement of Torts*, Sec. 428.

B. There is no evidence in this record of any contract purporting to make Belt an independent contractor in its performance of switching movements for respondent. But even if there were any such contract in evidence, it would be void as to petitioner and could not relieve respondent of its liability to petitioner for the negligence of those performing its switching operations. 35 *Stat.* 66, 45 *U.S.C.*, Section 55; *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 602, 613.

C. The jury found in response to special issues submitted to it that Belt was respondent's agent and was not acting as an independent contractor in the performance of the switching movement in which petitioner was injured (R. 12). There was evidence to support those findings, and they are conclusive upon this appeal. *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 374. Accordingly, respondent is liable for petitioner's injuries, which were found by the jury to be due to the negligence of the switching crew (R. 13).

Argument

I.

Respondent was liable to petitioner for the negligence of the persons to whom it had entrusted the performance of its switching operations, regardless of its exact legal relationship to them.

The performance of switching operations is a part of the function of transportation which respondent is bound

to perform. Section 1 (3), (4) and (18) of the Interstate Commerce Act, 41 *Stat.* 474, 47 *U.S.C.*, Sec. 1 (3), (4) and (18). It has uniformly been held that a common carrier by railroad has no power to delegate the performance of any portion of its function of transportation to others in such a way as to relieve itself of liability, especially liability to its employees and passengers. *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 12 L.R.A. (N.S.) 1196, 1199; *G. C. & S. F. Ry. Co. v. Shelton*, 96 Tex. 301, 316-317, 72 S.W. 165; *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 91; *Panhandle & S.F. Ry. Co. v. Crawford* (Tex. Civ. App.), 198 S.W. 1079, 1081; *Peters v. St. Louis, San Francisco Ry. Co.* (Mo. App.), 131 S.W. 917, 921-922; *Atlantic Coast Line Ry. Co. v. Tredway*, 120 Va. 735, 93 S.E. 560, 10 A.L.R. 1411, 1417.

In the *Floody* case the plaintiff was the employee of the Omaha company which operated into and out of a union depot in St. Paul owned and controlled by the Union Depot Company, a separate corporation. While riding on one of defendant's engines plaintiff was injured by the negligent operation of a switch by employees of the Depot Company. Defendant there raised precisely the same question as respondent here. The court disposed of that defense as follows:

> "We are satisfied that, as between the Omaha Company and the plaintiff, the company accepted the services of the switchman on that particular occasion to the same extent as though he had been in its employ.

"Conceding that, under the contract between the Union Depot Company and the Omaha Company, the latter was required to take its trains out of the depot over the switches in the manner directed by the switch tenders in the employ of the Union Depot Company, yet that fact did not discharge the railroad company from the contract relation which it assumed as between itself and plaintiff. *The test of liability is not determined by the fact that the switch tenders were in the employ and under the control of the Union Depot Company, and that, by virtue of the contract between the switchmen and that company, the relation of respondent superior existed.* The Omaha company owed the duty to plaintiff to use all reasonable diligence to carry him safely in its engine out of the depot yards, and it was immaterial to plaintiff whether in so doing defendant operated its train over its own tracks and switches, over the tracks and switches which it had leased from another company, or under a contract with the Union Depot Company. *It was immaterial to plaintiff that the switchmen were paid by the Union Depot Company, and were under its control in operating the switches, if, for the occasion, the Omaha Company chose to avail itself of the services of that company and its employees for the purpose of taking its train out of the depot.*" (Emphasis added) (p. 1199 of 13 L.R.A. (N.S.)).

In the *Shelton case*, a passenger rather than an employee was involved, but we consider the principle indistinguishable. There the plaintiff was a passenger on a train of the Gulf, Colorado & Santa Fe Railway Company, and was injured by the negligence of a switching crew of the Atchison, Topeka & Santa Fe which was switching the Gulf car by virtue of an arrangement between the two companies. The Supreme Court of Texas upheld a judgment for the plaintiff in the following language:

"It is contended by the plaintiff in error that the persons who had charge of the train at the time Shelton was injured were the servants of the Atchison, Topeka & Santa Fe Railway Company, for whose acts plaintiff in error is not liable. The facts show without dispute that the switching crew which had charge of the train, one member of which gave the direction to the plaintiff to leave the car, was employed by the Atchison, Topeka & Santa Fe Railway Company; that they performed the yard work for both companies at the point of connection at Purcell, and were paid by the company which employed them, the plaintiff in error paying to the other company one-half of the cost. There was no evidence of the terms of the contract between the two railroads concerning their joint business at that station. *Under this state of facts the men of the switching crew were equally the servants of both companies and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it.*" (pp. 316-317, 96 Tex) (Emphasis added).

The general principle involved in this situation is stated as follows in *Restatement of Torts*, Section 428:

"An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to work in carrying on the activity."

Respondent attempts to make the contention, in its brief in opposition to the petition for certiorari (p. 11), that the principle set out above applies only when a common carrier attempts to delegate the performance of a portion

of its functions to some other person or corporation not a common carrier. No basis whatever for such a distinction appears in the cases or is explained by respondent. No such distinction exists.

The maintenance of this principle is extremely important for the proper protection of railroad employees in the situation of petitioner. Here petitioner was working on his employer's train when it came into the station at Houston and continued to work on it carrying out the duties of his employment (R. 29). If his injuries had been due to the negligence of the crew which handled the train on its line haul, unquestionably respondent would have been liable. As the Court noted in the *Floody* case, it is immaterial to petitioner that the switchmen were paid by Belt and under its orders, if, for the occasion, respondent chose to avail itself of their services for the purpose of moving its train. In any case, petitioner was injured while in the performance of his duties by the negligence of those who were performing his employer's work. He is clearly entitled to compensation under the Employers Liability Act.

As respondent correctly points out in its brief in opposition to the petition for certiorari (pp. 7-8), there are many places in this country where switching of railroad cars is performed by terminal companies and not by the line haul carriers. If this Court holds that petitioner was not covered by the Act under the circumstances of this case, it will necessarily hold that any employee of a line haul carrier, while engaged in the performance of his employer's business on a car which is being switched by the employees of another corporation, has no claim under the Act if he is injured by the negligence of persons performing the

switching. Instead, he will be relegated to an action for damages under State law against a third party, subject to defenses not available under the Act, and frequently governed by a different statute of limitations. Respondent points to nothing, and obviously can point to nothing, in the legislative history of the Act which fairly indicates that Congress in enacting this legislation had any intention of so limiting or circumscribing the rights which railroad employees had before the Act, as illustrated in the *Floody* case.

Respondent's whole argument about the proper interpretation of the Act, as set out in its brief in opposition to the petition for certiorari, revolves around those cases, such as *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, and *Hull v. Philadelphia & Reading Ry. Co.*, 252 U.S. 475, which hold that in order to be entitled to the protection of the Act, a person must be an "employee" of a carrier. The basis of decision in those cases has no application whatever to the present case. They were concerned solely with the question of whether the particular plaintiffs involved were employees of the defendants and therefore entitled to the protection of the Act. Here there is no such question, since petitioner is unquestionably respondent's employee. While the Act makes the employer liable only to his "employee", it makes the employer responsible for the negligence of any of his "officers, agents or employees". This last phrase is couched in language as broad as Congress could have employed to designate any one for whose actions the employer was legally liable. Under the facts of this case, the switching crew of the Belt were (as the jury found) "agents" of the respondent.

In fact, the opinion in the *Robinson* case clearly illustrates the distinction which we are making. After stating the case and quoting the relevant provisions of the Act the Court there wrote as follows:

> "The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the act is a liability to the 'employees' of the carrier and not to others; and the plaintiff was not entitled to the benefit of the provisions unless he was 'employed' by the railroad company within the meaning of the act. It will be observed that the question is not whether the railroad company by virtue of its duty to passengers, of which it cannot devest itself by any arrangement with the sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger's safety. . . ." (237 U.S. 91).

Thus the Court very clearly stated that the only issue with which it was concerned was whether or not the plaintiff Pullman porter was "employed" by the railroad company and therefore entitled to the protection of the Act. It held that he was not. But it expressly recognized that the decision of that question did not control the question whether the railroad company might be liable to third parties for some act of his. The Court thus was not and could not have been deciding in the *Robinson* case, or in any of the similar cases cited by respondent, the question presented in this case, and none of the authorities cited by petitioner here has been "discredited".

II.

No contract between respondent and Belt could relieve respondent of its liability to petitioner for injuries suffered in the course of his employment.

The court below stated in its opinion that the switching crew here was switching "the plaintiff's car pursuant to a contract . . . which purported to make the Belt an independent contractor . . . while switching cars, including the plaintiff's car . . ." (295 S.W. 2d 508, 509). This statement is patently incorrect. No contract is in evidence which purported to make Belt an independent contractor while performing switching operations. But if any such contract had been in evidence, it would have been void as to petitioner under the plain terms of Section 5 of the Employers Liability Act (35 Stat. 66, 45 *U.S.C.*, Sec. 55) which reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: . . ."

If respondent had performed its own switching of passenger cars at Houston with its own crews, there would have been no question of its liability to petitioner for his injuries. It may have good and sufficient business reasons, as suggested by the witness Magee (R. 79) for using Belt's switching crews. However, neither the motives of the respondent in entering into such an arrangement, nor the powers of respondent and Belt under State law to make such a contract, can have any effect upon petitioner's rights here. To give the arrangement the force which re-

spondent claims for it would deprive petitioner of his rights under the Act and would give him in substitution therefor merely a common law action for damages against a third party, subject to defenses not available under the Act and governed by a different and shorter statute of limitations. We think it clear that Congress expressly intended that no such result should be possible, and that the above quoted provision of the statute is effective to prevent it.

Section 5 has been the subject of relatively little litigation since its enactment, and so far as we have found the only pertinent previous decision by this Court on this phase of the case is *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 613. There the employer contended that since the agreement being attacked had been made before the effective date of the statute it was not intended to be covered by Section 5 and that its purpose or intent could not have been to enable the carrier to exempt itself from liability. Mr. Justice Hughes, speaking for a unanimous Court, disposed of this contention as follows:

> "It is also insisted that the statute does not cover the agreement in this case, as it was made before the statute was enacted. But that the provisions of section 5 were intended to apply as well to existing, as to future, contracts and regulations of the described character, cannot be doubted. The words 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their neces-

sary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view." (p. 613).

III.

The jury's verdict has foreclosed respondent's defense that Belt was an independent contractor and not its agent.

The jury, in response to special issues submitted to it by the District Court expressly found (R. 12) that Belt was acting as agent for respondent and not as an independent contractor in performing the switching movement in which petitioner was injured, and (R. 13) that the injuries were due to the negligence of the switching crew. Respondent contended on appeal (R. 17) that these findings had no support in the evidence, and the Court of Civil Appeals agreed with that contention (295 S.W. 2d 508, 513). This Court has had occasion in a number of cases during recent terms to emphasize the proper consideration to be given to a jury's verdict in a case under the Employers Liability Act. The case which seems most apposite here, and the only one which we will cite for our present purpose, is *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 374. There, the jury found that the petitioner was a "member of the crew" and therefore entitled to sue under the Jones Act. The judgment based on that verdict had been reversed on appeal, on the theory that the evidence was insufficient to support it. This Court reversed, holding that the question of whether petitioner was a member of the crew was one of fact, that it had properly been left to

the jury, and that since there was some evidence upon which the verdict could have been based, it must stand. Here the question of whether the Belt was respondent's "agent" is fully as much a question of fact as the question before the jury in the *Senko* case.

All of the evidence affecting these issues was presented by witnesses who were officers or employees either of Belt or respondent, and sometimes of both. The jury was privileged to consider, among other things, the demeanor of those witnesses and their interest in shading the facts in a particular manner in determining the weight to be given to their testimony. In addition, it was wholly undisputed that respondent owned 50% of Belt's stock and appointed four of its directors (R. 39, 53) who always voted as a unit and could prevent any affirmative action by Belt's board (R. 87), that respondent reserved the right to demand the discharge of any Belt employee obnoxious to it (R. 42, 43), that respondent insisted that Belt's team tracks should not be open to other railroads in competition with respondent, even though Belt might thereby gain revenue (R. 91-93), that respondent admitted in pleadings filed with the Interstate Commerce Commission that it and the other stockholding lines "jointly controlled" Belt (R. 44, 46, 48), and that respondent, along with the other stockholding lines of Belt, procured a finding from the Interstate Commerce Commission that the relationship between respondent and Belt at the time of the accident to petitioner was one of agency (R. 48, 51) in the face of a vigorous protest by the Texas & New Orleans Railroad Company, one of respondent's competitors (275 I.C.C. 289, 311). Furthermore, the clear import of all of the evidence on this phase of the case is that Belt is nothing more than an instrumentality of respondent and the other

stockholding lines, created to perform switching and terminal operations for them at Houston, and wholly incapable of any independent existence (R. 38-40, 52-54, 64-65). All that the opinion of the court below says, in effect, is that the jury came to the wrong conclusion upon the basis of this evidence. But that is no part of the appellate court's function. Obviously, there was not only some evidence, but quite substantial evidence, to support the jury's verdict, and the court clearly erred in setting aside that verdict and rendering judgment against petitioner. To allow the judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial.

Conclusion

The judgment of the Court of Civil Appeals should be reversed, and that of the District Court (R. 14-15) affirmed.

Respectfully submitted,

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J. EDWIN SMITH
Attorneys for Petitioner

APPENDIX "A"

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (18)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier". The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary

in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio, apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passenger or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carrier subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(18) *Extension or abandonment of lines; certificates required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

RESPONDENT'S BRIEF

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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

REVISED CIVIL STATUTES OF TEXAS

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v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

RESPONDENT'S BRIEF

Questions Presented

Respondent takes exception to the Statement of Petitioner as to the Questions Presented. The Questions Presented are:

(1) Is Respondent liable under the Federal Employers Liability Act, 35 Stat. 65, 66, 45 U.S.C., Sec. 51, et seq., to its employee for an injury received by the employee, while working in the course and scope of his employment with Respondent, due to the negligence of an independent contractor.

(2) Did the contract between Respondent and Houston Belt & Terminal Railway Company fall within the prohibition of Section 5 of the Federal Employers Liability Act, 35 Stat. 66, 45 U.S.C., Sec. 55.

(3) Was there sufficient evidence to support the jury's finding that Houston Belt & Terminal Railway Company was the Agent of Respondent on the occasion in question.

While Petitioner's statement is substantially correct, save for a few unwarranted conclusions which he drew, Respondent submits that it is not complete. Respondent therefore submits the following additional statement.

The Houston Belt & Terminal Railroad Company (hereinafter referred to as H.B.&T.), is a Texas Corporation, organized in 1905 (R. 52) which among, other things, does all the switching of passenger cars for Respondent, Gulf Colorado & Santa Fe Railway Co., The Ft. Worth and Denver Railway Co. and the Rock Island Lines, at Houston. (R. 41). On the occasion in question, and for many years prior thereto Respondent owned 50% of the capital stock of the Houston Belt and Terminal Railroad Co.,[1] Gulf Colorado & Santa Fe Railway owned 25% of such stock, Ft. Worth & Denver Railway Company owned 12½% and the Rock Island Lines owned 12½%. (R. 39). The H.B.&T. owns Union Station (in Houston, Texas),

[1] At the time of the accident the stock of the Respondent was owned by Guy A. Thompson, Trustee of the Beaumont, Sour Lake & Western Railway Company and St. Louis, Brownsville & Mexico Railway Company. Since such time the Trusteeship of Guy A. Thompson has been terminated and all assets of the said Guy A. Thompson, Trustee of the Beaumont, Sour Lake & Western Railway Company and the St. Louis, Brownsville & Mexico Railway Company have been acquired by Respondent.

(R. 54), and the equipment it uses in its operation of the facilities. (R. 55). The H.B.&T. operates as a terminal and switching carrier, and it has tariffs on file which have been approved by the Interstate Commerce Commission and the Texas Railroad Commission. These tariffs apply to movements of cars other than those moved under the contract between H.B.&T. and Respondent and Gulf Colorado and Santa Fe and Burlington-Rock Island. (R. 55).

The H.B.&T. employs and discharges its own employees; (R. 56), it has contracts with various labor organizations; under these contracts its employees have their own seniority rights; (R. 57), the switch engines are operated by employees of the H.B.&T. (R. 57); the crews of the switch engines receive their instructions from the H.B.&T. Yardmaster. (R. 58).

The procedure followed with reference to making expenditures for improvements was for the H.B.&T. management to determine the cost and submit the matter to the H.B.&T. executive committee, which was composed of members of the H.B.&T. Board of Directors. (R. 60). In making settlement of claims made by its employees the H.B.&T. management can make settlements up to a certain amount, but if it is a substantial settlement the matter must be passed upon by the executive committee. (R. 99).

The H.B.&T. performs switching for the Southern Pacific Lines and the Missouri-Kansas-Texas Railroad Company to industries located on the H.B.T. lines. (R. 73). The H.B.&T. also switches cars to and from industries. (R. 96). These charges are covered by regularly filed tariffs. (R. 96). The charges made to Respondent, Gulf Colorado & Santa Fe and Burlington-Rock Island for the services performed

for them by the H.B.&T. are in proportion to the number of cars handled into and out of the passenger station for each line. (R. 56).

One portion of the contract, in effect on the occasion in question, read as follows:

> "The Terminal Company shall have the *exclusive* management and *control* of the *operation, maintenance, repair* and *renewal* of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal facilities and the use and enjoyment thereof in all other respects; provided, always, that such rules and regulations shall be fair and equitable and shall apply equally and without discrimination to all the railway companies using the terminal facilities. The railway companies agree to comply and cause their employees to comply with such rules and regulations." (Emphasis ours)

Summary of Argument

A. The Federal Employees Liability Act creates liability on the part of the carrier *only* for injury resulting in whole or in part from the negligence of any "of its officers, agents, or employees of such carrier." The injury in question resulted from the negligence of an independent contractor and hence not from an *officer, agent, or employee* of the carrier: *Robinson v. Baltimore & O. R. Company,* (Sup. Ct. 1915) 737 U. S. 84, 59 L. Ed. 849; *Hull v. Philadelphia & Reading Railway Company* (Sup. Ct. 1920) 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670. One common carrier can contract with another to provide an ancillary specialized service. *Gaulden v. So. Pac. Co.* (1948) 78 F. Supp.

651, aff'd 174 F. 2d 1022; *Moleton v. Union Pacific R. R. Company, et al* (Utah, 1950) 219 P 2d 1080, Cert. Den. 340 U. S. 932, 95 L.E.D. 672, 71 Sup. Ct. 495.

B. Section 5 of the Act (45 U.S.C. Sec. 55) is not applicable to this case. Section 5, by its own wording, only applies where some contract or rule is designed to defeat liability created by the act. That isn't the situation in the instant case because the act did not create liability upon the carrier for the negligence of independent contractors.

C. H.B. & T. on the occasion in question, was acting in its usual and consistent role as an independent contractor, and not as Respondent's agent. H.B. & T., and not Respondent, had full and complete control of the premises and switching operations and Respondent had divested itself of the right of control, in that it had no longer a right to terminate the work or direct it. *Cimarelli v. New York Central Railroad Company*, (Ct. Appeals, 6th Cir., 1945, 148 F. 2d 575).

Argument

I.

Respondent is not liable to Petitioner for the injury in question simply because the injury was not caused by Respondent or any of its agents, servants, or employees.

Petitioner's contention under this argument is that conceding the H.B. & T. to be an independent contractor and hence its agents, servants, and employees are not the agents, servants, and employees of Respondent, still Respondent is liable for the negligence of the employees of the H.B. & T. under the provisions of the Federal Employers' Liability Act.

This contention is made without any finding or allegation that Respondent was negligent in selecting the H.B. & T. as the Company to do its switching and without any allegation or finding that the H.B.&T. was not competent in this respect.

Petitioner's contention is not tenable. It ignores not only the very wording of the Act but also the pertinent cases construing the Act. The Act reads as follows (45 USC, Sec. 51):

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from *the negligence of any of the officers, agents, or employees of such carrier. . .*" (Emphasis ours).

The wording of the Act is plain. It specifically provides that the carrier will be liable for injuries resulting from *"the negligence of any of the officers, agents, or employees of such carrier."* It does not make the carrier responsible for all injuries sustained by its employees while working in the course and scope of their employment. Liability on the part of the carrier is conditioned upon negligence on the part of the officers, agents, or employees of such carrier. Absent that condition, there is no liability on the part of the carrier under the Act.

The cases have uniformly adhered to the plain wording of the Act. In the cases of *Hull v. Philadelphia & Reading Railway Company* (Sup. Ct., 1920), 252 U. S. 475, 40 Sup. Ct. 358, 64 L. Ed. 670, *Linstead v. Chesapeake & Ohio*

Railway Company (Sup. Ct. 1928) 276 U. S. 28, 72 L. Ed. 453, and *Robinson v. Baltimore & Ohio Railway Co.*, (Sup. Ct. 1915) 59 L. Ed. 849, 737 U. S. 84 this very point was decided.

In the first of these three cases, *Robinson v. Baltimore & Ohio R. Co. Supra* the precise issue before the Court was whether a Pullman Porter, in the employ of the Pullman Company, was an employee of the Railroad Company within the meaning of the Act. The Court held that the Pullman Porter could not be considered as an employee of the Railway Company so as to bring him within the purview of the Act. At p. 853 of 59 L. Ed., the Court, in the course of its opinion, stated:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, *and intended to describe the conventional relation of employer and employee.* It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such person among those to whom the Railway Company was to be liable under the Act."

We respectfully ask the Court to bear in mind that the Court in the above case expressly holds that Congress used the words "employee" and "employed" *in their natural sense* "and *intended to describe the conventional relationship* of employer and employee." (Emphasis ours). We ask the Court to bear in mind further that the Act makes no distinction in the meaning of the term "employee" in describing the injured party and in describing the "party" causing the injury. Thus the holding of the Court in the

Robinson Case, Supra, is that not only must the injured party be an employee of the carrier but also that the negligent party must also be an officer, agent, or employee of such carrier.

The *Robinson Case, Supra,* was decided in 1915, some 43 years ago. Congress has been in session many times since that decision and had not seen fit to amend the Act. Such fact certainly argues persuasively for the conclusion that the Court correctly interpreted the Act.

The *Robinson Case, Supra,* was followed by the *Hull Case, Supra.* In the *Hull Case, Supra,* the deceased, Hull, was an employee of the Western Maryland Railway Company. He was engaged in operating a Western Maryland train on a run which was partly over the tracks owned by the defendant, Philadelphia & Reading Railroad Company. While operating on the Reading tracks, Hull was killed due to negligence of a locomotive engineer employed by the defendant. At the time Hull was killed, his train had stopped pursuant to instructions given by an employee of the defendant Company. The plaintiff took the position that Hull was an employee of the defendant company. The Court in overruling this contention stated, at p. 673 of 64 L. Ed.,

> "We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co., 237 US 84, 94, 59 L. Ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N.C.C.A. 1, that in the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the (480) facts as recited and according to the general principles applicable to the relation,

Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes — certainly for the purposes of the act — an employee of the Western Maryland Company only. It is clear that each company retained the control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and their orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety for all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U. S. 215, 226, 53 L. Ed. 480, 485, 29 Sup. Ct. Rep. 252."

The last of this trio of cases, the *Linstead Case, Supra,* involved an action by an Administratrix for the wrongful death of Linstead, who was killed due to the negligence of the defendant, Chesapeake & Ohio Ry. Co. Linstead, at the time he was killed, was a member of a switch crew employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, working in the terminal yard of the Chesapeake & Ohio. The Chesapeake & Ohio and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company exchanged traffic in this terminal yard, which consisted of some 12-13 miles of track. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company lent a loco-

motive, caboose and train crew to the Chesapeake & Ohio yard to take freight trains going to the Cleveland, Cincinnati, Chicago & St. Louis yard at Riverside, Ohio, from a point in the Chesapeake & Ohio Terminal yard, some 12-13 miles, to the Cleveland, Cincinnati, Chicago & St. Louis tracks. It was while engaged in this work that Linstead was killed. The Court in considering this point (P. 456 of 72 L. Ed.) stated that the deceased was doing the work of the defendant (Chesapeake & Ohio Ry. Co.) and the defendant had the right of control.

The rationale and holding of the Supreme Court in the above cases makes it clear beyond doubt that the Federal Employer's Liability Act is applicable only when the negligent party is an officer, agent, or servant of the employing carrier. In the *Robinson Case, Supra,* the Court, speaking through Justice Hughes, specifically said that Congress used the word "employee" in its natural sense. It necessarily follows that the carrier is not responsible for the negligent acts of the employees of an independent contractor, since the employees of the independent contractor are not employees of the carrier within the natural sense of the word "employee". In both the *Hull Case, Supra,* and the *Linstead Case, Supra,* the Court went into great detail to examine whose work was being done by the deceased and who had the right of control. In the *Hull Case, Supra,* the Court found that he was not doing the work of the negligent party and the negligent party did not have the right of control and hence, the Court denied a recovery. In the *Linstead Case, Supra,* the Court felt that the deceased was doing the work of the negligent party, and also that the negligent party had the right of control and hence, it upheld a recovery. In subsequent pages of this brief, we will show that the switching crew in question was not

doing Respondent's work and Respondent did not have the right of control. The point we wish to make here is that all three of these cases are directly contrary to Petitioner's position on this point. One case specifically says there must be an employer-employee relationship and the other two cases hold that there must be an employee relationship—at least at the particular time in question. Absent such relationship, there can be no recovery.

Petitioner many contend that the question of assignability or delegation of some of the ancillary functions of a common carrier were not involved in the above cases. Such contention will overlook the salient facts present in those cases. In the *Robinson Case, Supra*, the plaintiff's contract of employment was with the Pullman Company. Certainly his duties on the train were in the furtherance of interstate commerce. The Supreme Court in that instance refused to hold the Act applicable. Such refusal is tantamount to holding that while the work being done is for the ultimate benefit of the Railway Company, still if it is done under the direction and supervision of another master, the doing of such work does not make the man the employee of the carrier. This principle is expressed in the case of *Standard Oil v. Anderson* (Sup. Ct.) 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480.

In the *Hull Case, Supra*, the Western Maryland Co., with whom deceased had his contract of employment, was operating its train, pursuant to a contract over the tracks of the defendant. The plaintiff contended that since the Philadelphia & Reading had the non-delegable duty to operate its road, and since Hull, an employee of the Western Maryland, was operating on the road of the Philadelphia & Reading, he was performing a non-delegable duty with

the knowledge and assent of the Philadelphia & Reading, and hence he was an employee of the Philadelphia & Reading. Such contention is shown at P. 671 of 64 L. Ed. The Court in its opinion ignored this argument and based its decision on the question of control. Likewise the Court in the *Linstead Case, Supra,* based its decision on the question of control. See 72 L. Ed. Pgs. 455-6. Accordingly, Respondent submits that both of these cases are directly contrary to Petitioner's position under this point.

Subsequent cases which support Respondent have followed the above quoted cases.

The case of *Louisville & N. Railway Co. v. Wingo's Administratrix* (Kentucky, 1926) 281 S.W. 171, was an action for damages under the Federal Employer's Liability Act for the wrongful death of Wingo, a car inspector employed by the Defendant, who was killed when a switch engine owned by, and being operated by employees of, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, undertook to switch the dining car he was inspecting. The trial Court had sustained a demurrer to defendant's amended answer and such action had been assigned as error. The Court in disposing of such contention stated:

> "The answer does not set forth the terms and conditions under which the lessor was to furnish all employees for the joint service. Construed in connection with the petition, it impliedly admits that the employees engaged in switching and coupling the diner were serving appellant only at the time of the injury. While it is alleged that the instrumentalities by which the diner was being moved were under the exclusive control of the lessor, there is no allegation that the members of the switching crew were subject to the

sole control of the lessor, or that they were not subject to the direction of appellant. We need not discuss the various tests for determining when the relation of master and servant exists. Here the switching crew sometimes served the Pennsylvania Company. At other times as on the occasion in question they served appellant. *In a case of this kind the question of control is of paramount importance.* In the absence of a showing that while serving appellant, they were under the sole direction and control of the lessor, the members of the crew must be regarded for the time being as the employees of appellant. Atlantic Coast R. Co. v. Treadway, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411; Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 112 N.W. 875, 102 Minn. 81, 13 L.R.A. (N.S.) 1196. It follows that the Court did not err in sustaining the demurrer to the second paragraph of the amended answer." (Emphasis ours).

The most recent case we have been able to find on this point is the case of *Moleton v. Union Pac. RR. Co., et al.* (Sup. Ct. Utah, 1950) 219 P. 2d 1080, Cert. denied, 340 U.S. 932, 95 L. Ed. 672, 71 S. Ct. 495). In that case the plaintiff's contract of employment was with the Pacific Fruit Express Company. The plaintiff was injured while working in the yards of the defendant, Union Pacific R.R. Co., at Laramie, Wyoming, servicing a car, owned by the Fruit Growers Express, which was being hauled in a train by defendant, Union Pacific. The plaintiff contended that since he was performing the work of the Railroad Company, the provisions of the F.E.L.A. were applicable. The Court in deciding the issue went into great detail to examine the question as to who had control of the work. The Court found that the Railroad Company did not have

the requisite control and hence denied the claimant a recovery. The *Moleton Case* is strong and persuasive authority for respondent's position in this case at bar.

The switching of Railway cars in larger cities has become a specialized service which is ordinarily performed by a terminal company and not by the Railroad Company which brings the car into the city. See the cases of *Fort Worth Belt Railway Company v. United States* (Ct. Appeals 1927) 22 F. 2d 795, which sets out the activities of the Fort Worth Belt Railway Company, and *Terminal Railway Association v. U. S.* (S. Ct.) 266 U.S. 18, 69 L. Ed. 150, which describes the activities of the Terminal Railway Association of St. Louis. In this case the testimony of the witness Magee, shows that the Interstate Commerce Commission makes a distinction between switching carriers and Line Haul carriers, when he testified (S.F. P. 157) that the Houston Belt and Terminal Railway Company is classified as Class I among switching carriers by the Interstate Commerce Commission.

In addition to the foregoing, our Legislature has enacted a provision expressly authorizing the organization of Terminal Railway Companies. See Art. 6549 of Vernon's Annotated Texas Statutes which reads, in part, as follows:

> "Terminal railways shall have all the rights and powers conferred upon railroads by Chapters 6 and 7 of this title. . ."

Also Sections 67 and 72 of Article 1302 Vernon's Civil Statutes of the State of Texas, Annotated, authorize the creation of private corporations for the purpose of construction, operation, and maintenance of terminal railways.

From the foregoing it will be noted that both the Texas Legislature and the Interstate Commerce Commission recognize the distinction between Terminal Railways and Railroads whose tracks go from city to city. Recognizing this distinction our legislature has authorized the creation of corporations to perform the services of a terminal railway company. There has been no limitation put upon the power of terminal railway companies to contract with other railroad companies.

The cases have held, uniformly, that where a railroad company utilizes the services of another company, also a common carrier, for a special service, the employees of the other company are not the employees of the Railroad Company within the terms of the Federal Employer's Liability Act. The *Moleton Case*, *Supra*, is an example of that principle. Surely in that case the servicing of the cars which were in the defendant's train was as much a performance of the functions of a common carrier as was the switching of the private Railway car on the occasion in question. Yet the plaintiff, in the *Moleton Case*, *Supra*, was denied a recovery because the element of agency was lacking. He was working for an independent contractor and hence not an employee of the Railway Company. The *Robinson Case* *Supra*, is another example of this principle. Certainly the attending upon passengers, in a passenger train, whether they are Pullman passengers or coach passengers, is as much a performance of the functions of a common carrier as was the switching of the car in the instant case. Yet the Court denied a recovery in the absence of facts showing an agency relationship. The *Hull Case* and the *Linstead Case*, *Supra*, are also examples of this principle. In the *Hull Case*, *Supra*, the element of control was lacking and hence the

Supreme Court denied a recovery while in the *Linstead Case, Supra,* the element of control was present and hence the Supreme Court upheld a recovery. The case of *Wingo's Administratrix, Supra,* is another example. In that case the switching of the cars was as much the function of a common carrier as was the switching of the car in the instant case. In that case the Court upheld a verdict for the plaintiff because the element of control was present.

These cases show clearly that a carrier is not responsible for the acts of the employees of an independent contractor when such contractors are engaged in the performance of switching operations.

The cases relied upon by Petitioner are either not in point or have been discredited.

The *Shelton* case cited on pages 10 and 11 of Petitioner's Brief is not in point. Petitioner urged that case in his brief before the Texas Court of Civil Appeals and the Texas Supreme Court. On each occasion Respondent has pointed out the distinction between the *Shelton* case and the instant case. Since the *Shelton* case was decided by the Supreme Court of Texas and this case was passed upon by that Court we submit that the distinction is a valid one. Certainly the Supreme Court of Texas would not have allowed the judgment of the Court of Civil Appeals in this case stand if such had been contrary to the holding of the Supreme Court in the *Shelton* case.

The distinction between this case and the Shelton case is just simply that there was no showing in the *Shelton* case, as there is in the instant case, that the Defendant did not exercise any control over the switch crew of the H.B.&T., the crew causing the injury. Under Texas law if the Defendant, as in the *Shelton* case, had the right of control

over the switch crew, it would be responsible for the negligence of the crew. *G. C. & S. F. Ry. Co. v. Dorsey;* 66 Tex. 148.

We respectfully submit that the *Shelton* case, Supra, is not any authority for Petitioner's position in this case.

The reasoning of two of the other cases upon which Petitioner relies *Floody v. Great Northern Ry. Co. & Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 102 Minn. 81, 112 N.W. 875, 13 L.R.A. (U. S.) 1196 (cited on pp. 9 and 10 of Petitioner's Brief) and *Atlantic Coast Line Ry. Co. v. Treadway*, (cited p. 9 of Petitioner's Brief), 120 Va. 735, 935 S.E. 560, 10 A.L.R. 1411 have been discredited by the United States Supreme Court in the case of *Hull v. Philadelphia & Reading Railway, Supra,* (64 L. Ed. 670), discussed earlier in this Reply. In the *Hull* case the plaintiff argued that since the Railway Company had the nondelegable duty of the operation of its road (citing *Central Transportation Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. Ed. 55), the plaintiff was an employee of the Reading Company since he was performing a nondelegable duty for the Reading Company, citing the *Treadway Case, Supra.* This argument is shown at the top outside column on p. 671 of 64 L. Ed. The Supreme Court ignored this contention and decided the case on the element of control. Not even the dissenting opinion considered the contention worthy of mention. It only differed with the majority in that it thought the necessary control was present. Since the reasoning of the *Treadway Case, Supra,* has been discredited by the United States Supreme Court and since the *Floody Case, Supra,* is based upon the same reasoning we respectfully submit that they are not any authority for Petitioner's position in this case.

Similarly the quotation from the Restatement of Torts (cited on p. 11 of the Brief) do not support Petitioner's position. The rule stated there relates to a delegation to a person or firm other than a common carrier. The *Hull Case, Supra,* the *Moleton Case, Supra,* and the *Robinson Case, Supra,* are contrary to the rule laid down in those authorities when applied to the facts in the instant case.

It should be remembered that the construction given the act in the *Robinson, Hull & Linstead cases* has withstood the test of time. Congress, even though it amended the act in 1939, has not shown any inclination to enlarge the category of the parties for whose act a carrier is liable. Petitioner's argument at the bottom of Page 13 of his brief that the phrase which Congress used in designating the parties for whose acts the carrier is responsible — its "officers, agents or employees" — is as broad as Congress could have used is obviously incorrect. Congress could have made the carrier liable for all injuries received by its employees while working in the scope of their employment. However, Congress did not do so. It limited the liability of the carrier to the negligent act of its "officers, agents and employees" — persons whose conduct the carrier could control.

The Court, in the case of *Gaulden v. Southern Pacific Company,* 78 F. Supp. 651 (Dist. Ct. 1951) aff'd 174 F. 2d 1022 very amply stated at Page 654:

> "The remedial and humanitarian purposes of the Employer's Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that Petitioner is not without redress for his injuries. * * * It is not for the Courts to extend the coverage of the Liability Act into new fields.

II.

Section 5 of the act (45 U.S.C., Sec. 55) is not applicable to the case.

Section 5 of the Act is quoted on page 15 of Petitioner's Brief and provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall * * * be void. * * *" Section 5 is not applicable to this suit. It provides that contracts the purpose of which is to exempt a carrier from liability created under the Act are void. The Act did not create liability upon the carrier for the negligence of the employees of its independent contractors. The Act only creates liability upon the carrier for the negligence of its "officers, agents and employees." It is not responsible for the acts of an independent contractor, with whom it has a right under the law to contract. Section 5 only applied to instances where the carrier would be responsible to the employee under the terms of the Act but for a "contract or rule" by which the carrier sought to exempt itself from liability. In such instance the contract or rule is void. That isn't the situation in this case. Respondent is not responsible to Petitioner in this case because of the legal relationship between itself and the H.B.&T. It is not relying upon any "contract — the purpose or intent of which shall enable" it to exempt itself from any liability created by the Act.

In the case relied upon by Petitioner in his Brief, *Philadelphia, Baltimore & Washington RR. Co. v. Schubert*, 224 U. S. 603, 56 L. Ed. 911, the court had under consideration a contract between a carrier and its employee which provided that the company should deduct the sum of $2.10 from the employee's wages each month to be

placed in a relief fund. The contract further provided that in case of injury the acceptance of benefits from the relief fund would constitute a release from the assertion of a claim or institution of a suit would bar any further payments from the fund. Justice Hughes had this contract before him when he made the remarks quoted on page 16 of Petitioner's Brief. At page 916, the court stated:

> "The statute (45 U.S.C.A. 51) provides that 'every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. * * *' That is the liability which the Act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute."

This Honorable Court will note that Justice Hughes is holding that the contract in question is one of immunity. Manifestly, that isn't even slightly similar to the contract in the instant case. The Petitioner cites not one single case to support his contentions under this point. The cases of *Moleton v. Union Pacific RR. Co., Supra,* and *Gaulden v. Southern Pacific Co.,* 78 Fed. Supp. 651 (1948); affirmed 174 F. 2d 1022 support Respondent's position. The fact situations in those cases are very similar to the instant case.

We submit that the record in this case wholly fails to show that the Houston Belt & Terminal Railway Company was used by Respondent "as a device to obtain the forbidden end." *Gaulden v. Southern Pacific Company, Supra.* Just as in the *Moleton Case, supra,* no one concerned with the operation of the Terminal thought the railroad was performing the services, and merely took on the Terminal company for the purpose of acquiring the use of their employees.

III.

There was no evidence to support the finding of the jury that H.B.&T was acting as Respondent's agent and the evidence was such to require the Court to hold that H.B.&T. was, as a matter of law, an independent contractor on the occasion in question.

Petitioner's contention that the H.B.&T. was acting as Respondent's agent on the occasion in question is not sound. In *Cimorelli v. New York Central Railway Company* (Ct. Appeals, 6th Cir., 1945), 148 F. 2d 575, the Court stated the applicable question in cases of this nature, to be as follows:

> "Whether Appellee, (the Railway Company) for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Company and had thus divested itself of the right of control, to the extent that it had no longer a legal right to terminate the work or direct it?"

The Court, in the *Cimorelli Case*, went further and set out certain tests by which the answer to the above question could be determined. The Court stated the following to be the tests.

"One of the tests is who has the right of control over the work being done. Other recognized tests are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of the contractor's business, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workmen are employed, the method of payment, whether by time or job, and whether the work is part of the regular business of the employer. The important test is the control over the details of the work reserved by the employer and to what extent the person doing the work is in fact independent in its performance."

These are substantially the same tests as set forth in the other cases cited, supra. In the *Moleton Case, Supra,* the Court stated the tests in the following words:

"The Court has considered five elements in determining the question:

(1) the selection and employment of the servant;
(2) the payment of his wages;
(3) the power to discharge the servant;
(4) the power to control his action; and
(5) the person whose work is being done by the servant. Murray v. Wasatch Grading Co., 73 Utah 430, 274 P. 940.

The first four of these, clearly, under the facts of the present case, point to the express company as the responsible employer. As to the fifth, we believe, in this case, that the express company was the one whose work was being done. Of course, the railroad will ultimately benefit from it, but we do not believe that anyone concerned thought the railroad was performing the services, and merely took on the express company for the purpose of acquiring the use of their

employees. It is, in a sense, a specialized service which has been recognized as such for years."

We respectfully ask the Court to compare the facts in the instant case with the tests laid down in the *Moleton Case, Supra.* Here the H.B.&T. had the right to select and employ the switchmen. Likewise, here the H.B.&T. paid the switchmen, had the right to discharge them, the power to control them, and the switchmen were doing the work of the H.B.&T. The switching of cars was the object for which the H.B.&T. was incorporated, and the switchmen in switching the car in question, were performing, for the H.B.& T., the very function for which it was incorporated.

Also, we ask the Court to compare the facts in the instant case with the tests set out in the *Cimorelli Case, Supra.* In the instant case the H.B.&T. had the right of control. It was the right of H.B.&T. to furnish what personnel it thought necessary, what tools and machinery it thought necessary. Also, the H.B.& T. was paid by the job. The amount of remuneration received by it depended upon the number of cars it handled for Respondent. Certainly this is consistent with an independent contractor relationship.

The *Cimorelli Case, Supra,* also stated one of the tests to be whether the work is part of the regular business of the employer. We have demonstrated in the preceding pages of this brief that the switching of railroad cars in larger cities has for many years been done by Terminal Companies. See *Ft. Worth Belt Railway Co. v. U. S., Supra* (22 F. 2d 795) and *Terminal Railway Ass'n. v. U. S., Supra* (266 U.S. 18, 69 L. Ed. 150). This fact is further shown by the testimony of the witness Magee, regarding classification of Railroad Companies by the Interstate Com-

merce Commission and by the provisions of Vernon's Annotated Civil Statutes (Art. 6549 and Sections 67 and 72 of Article 1302), authorizing the creation of corporations for this very purpose. These factors certainly show that switching in the larger cities, like furnishing and servicing refrigerator cars *(Moleton v. Union Pac., Supra)*, "is, in a sense, a specialized service which has been recognized as such for years." Thus, the H.B.&T., in switching the car in question, was not performing a part of Respondent's work.

As the Court of Civil Appeals points out in its opinion, the H.B.&T. owns the switch yards and terminal facilities where the accident in question occurred (R. 54), employs, pays, disciplines, and discharges its own employees, and determines the claims of said employees, and has made contracts with the various Unions concerning its employees (R. 56, 57 and 99), owns and leases locomotives and other equipment necessary for its business (R. 55), employs a Purchasing Agent, and makes purchases pursuant to authority given by its Executive Committee, which is made up of some of the members of its Board of Directors (R. 55). The principal part of the H.B.&T.s business is to switch cars, both for its proprietary lines and for other lines using its facilities, and all this it does with its own equipment, operated and directed by its own employees.

The evidence in this case certainly meets all the tests set out by the Court in the *Cimorelli Case, Supra.* Neither Respondent, nor any of its employees had the right to control or direct the switching crew in question. The contract provided:

> "The Terminal Company shall have the *exclusive management and control* of the *operation, maintenance,*

> *repair* and *renewal* of the Terminal facilities and every part thereof, and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities . . . The railway companies agree to comply and cause their employees to comply with such rules and regulations." (R. 59)

Clearly, this excerpt which provides that the H.B.&T., and only the H.B.&T., shall have control of the operation of the Terminal, negatives any idea that Respondent had any control whatsoever over the Terminal operations.

The evidence cited by Petitioner as supporting the jury's agency finding, wholly fails to support such finding. The fact that Respondent owned 50% of the Capital Stock, elected four (4) of its Directors and represented to the Interstate Commerce Commission that it and the other Stockholders "jointly controlled" the Belt, is no evidence of the type of control required to show agency. *Pullman's Palace Car Company v. Missouri Pacific Railway Company*, 29 L. Ed. 499, 502. The Stockholders of every company jointly control the company and elect the Board of Directors. Yet such joint control does not make the corporation the agent of each stockholder. The provision of the contract, whereby the railway companies could request the H.B.&T. to discharge an employee who was unfit to perform his duties, is a reasonable provision *(Friedman v. Vandalia Railroad Company* (Ct. App., 1918), (254 F. 292). It is the Belt, not Respondent, who can discharge the employee, and then only after a hearing. (R. 61).

While Respondent may have objected to the H.B.&T. switching cars that came into Houston over the lines of the Texas & New Orleans Railroad Company, there is no evidence that the H.B.&T. refused to switch such cars. The only evidence is that the H.B.&T. would require

payment from the consignee of the switching charges. In fact the H.B.&T. did switch cars for the Texas and New Orleans Railroad Company. (R. 55). The H.B.&T. was not depriving itself of anything, since payment from the consignee was as good as payment from the Texas & New Orleans Railroad Company.

The use by the Interstate Commerce Commission of the word "agent" in its approval of the contract which went into effect in 1950, subsequent to the date of the accident in question, is of no probative value on this issue. The word "agent" is often used to describe independent contractor relationships. *Gaulden v. Southern Pac. Co.* (D.C., 1948), 78 F. Supp. 651, aff'd. 174 F. 2d 1022. It is clear from the excerpt, that the Commission was not concerned with the issue at hand. It made no reference to the traditional tests. Indeed, the Commission does not concern itself with the point at hand. The Commission may have been thinking of an agency relationship within the meaning of the Carmack Amendment (49 U.S.C.A., Sec. 20), where each carrier is the agent of the initial carrier. *Galveston H. & S. A. Ry. Co. v. American Grocery Company* (1931), 36 S.W. 2d 985, 992. But the Federal Employers Liability Act did not use the word "agent" in that sense. It used the word in the conventional sense. *Hull v. Philadelphia & Reading Railway Co., Supra.* The argument on Page 18 of Petitioner's brief that Respondent and the other companies which owned stock in the H.B.&T. "jointly controlled" the Belt is fallacious. That argument can be used to make every corporation the agent of any of its stockholders. If A owns one share of stock of General Motors Corporation, A and the other stockholders of General Motors jointly control General Motors. To hold that such control constituted General Motors the agent of its stockholders would be to completely rewrite

the law of agency. The only control Repondent and the other companies had in the instant case over the Belt was the legitimate control every shareholder has over a corporation in which he owns stock. That was the only representation made to the Interstate Commerce Commission (R. 48). This Control does not give the shareholder control of the day to day operation of the company and does not make the corporation the agent of the stckholder. *Pullman's Palace Car Company v. Missouri Pacific Railroad Company*, 29 L.E.D. 499.

Petitioner's argument at the top of Page 19 of his brief that the Belt was wholly incapable of any independent existence is a mere conclusion on the part of petitioner, which is wholly unwarranted.

Conclusion

The intent of Congress is plain. In order to hold the carrier liable for injuries to its employees, the carrier or its agent or employees, must have been negligent. The negligent act in the instant case was the act of the H.B. &T., and the H.B.&T. only. The fact that Petitioner chose not to sue the H.B.&T. should not create liability on the part of Respondent.

Respectfully submitted,

ROY L. ARTERBURY

Walter F. Woodul

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IN THE

Supreme Court of the United States

October Term, 1957

No. 133

PARRIS SINKLER

v.

MISSOURI PACIFIC RAILROAD COMPANY

RESPONDENT'S MOTION FOR REHEARING

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SUBJECT INDEX

LIST OF AUTHORITIES

CASES

IN THE

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RESPONDENT'S MOTION FOR REHEARING

I.

The Supreme Court of the United States erred in its majority opinion, holding that the conduct of operational activities dealing with cars of the Respondent Missouri Pacific Railroad Company, a Missouri corporation, by a separate Texas corporation through its own separate employees and with its own separate equipment constituted such Texas Corporation and/or its employees so engaged, "officers, agents or employees" of the carrier for whom the plaintiff worked, within the meaning of the Federal Employers Liability Act.

Argument

When this Honorable Court has finished the reading of this, the Respondent's Motion for Rehearing, we sincerely hope that the Court will have sensed Respondent's deep concern over the problem that will confront not only the Respondent but American Railroads generally if the Court's majority opinion should become final. A real problem will result in all large industrial shipping centers where Railroad Terminal Companies have become a necessary, and a vital part of the railroad industry.

The payment of the monetary judgment by Respondent to the Petitioner would be comparatively inconsequential. The tremendously important and dangerous aspect of the decision, if permitted to stand, is that it needlessly shakes the very foundation of the Terminal Companies.

The Petitioner in this case had a perfect legal remedy against the Houston Belt and Terminal Railroad Company. Had he so filed his suit he couldn't have failed to recover because as to liability of the Belt, he had *a res ipsa loquitur* case. Through neglect, carelessness, or unconcern, he failed to file his suit against the Belt within the two year period allotted by the law. Just nine days short of three years after the accident, and after he had lost his right to sue the Belt, an attorney whom he consulted advised him that he "had waited so long that his only chance was to sue his own company and see what would happen!" (R. P. 35). This statement of Petitioner from the witness stand reflected clearly his attorney's dim view of his right of recovery against the Respondent. He knew that their only chance was to picture the Houston Belt and Terminal Railroad Company as a mere

"stooge", a subservient agent of the Respondent, subject to its entire control and manipulation and performing a non-delegable duty. This conclusion is clearly evidenced by the adroitly and prejudicially worded statement with which Petitioner's application for certiorari is concluded, to-wit:

> "the ultimate fact that Belt is nothing more than an instrumentality of Respondent and the other stockholding lines, created to perform switching, and terminal operations for them at Houston, and wholly incapable of any independent existence, all furnish ample support for the Jury's verdict. To allow the Judgment of the Court of Civil Appeals to stand is to deprive petitioner of his right to a jury trial" - Page 12 - Petition for Writ of Certiorari.

The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas took cognizance of Petitioner's analysis of the evidence in that regard and properly evaluated it in that Court's written opinion (R. P. 107.) We will not repeat that evaluation here, but suffice it to say that the Court's opinion in that regard is in line with the great weight of authority, (see cases cited in the Court's opinion).

As against the Petitioner's Prejudicial appraisal of the Belt, which by the way, has now been repudiated by fourteen appellate Judges, (two members of this Honorable Court, two members of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, and nine members of the Supreme Court of Texas), Respondent will now pose the real facts as disclosed by the record together with facts of which this Court can take Judicial knowledge.

The Houston Belt and Terminal Railroad Company is a legal entity, a duly incorporated Railroad Company, with charter powers, and franchise obligations, in just as true and as strict a sense as the Missouri Pacific Railroad Company has charter powers and franchise obligations.

The Sovereign State of Texas, under the authority of Art. 6549, and Sec. 72 of Art. 1302 of its Civil Statutes issued to the Houston Belt & Terminal Railroad Company, its charter, giving it full right and authority to own and operate terminal facilities, including the Union Railroad Passenger Station in Houston, the railroad yard and the main line and switch tracks that lead to such Union Station. The State of Texas issued such charter because it recognized, (1) That the general Public was entitled to a safe, an economical, and a business like handling of Railroad traffic entering the City of Houston. (2) That it would be imprudent, unsafe, unbusiness like, and thoroughly impractical to force the various Railway Lines which serve the City of Houston to locate (if possible) and purchase separate yards, and build and maintain separate Passenger Stations, with a net work of railroad tracks which would have to cross and recross the other similar net works of tracks of each of the other Railroad Companies that serve the City of Houston. (3) That it was not only sound Railroading Practice, but also good business to permit one Railroad Company (preferably not one engaged in inter-city transportation) to own and operate one terminal passenger station, one set of terminal tracks, one managerial set up, one traffic dispatching system, to prevent congestion of train movements, and the bottlenecking of cars. (4) That the margin of safety to both the general public and the employees

of the several railroad companies serving the City of Houston increases as the number of separate companies participating in terminal operations decreases.

These dominant factors have been known to the various railroad systems over the Country at large for long over a half century, and the Legislative bodies of the various States, charged with the enactment of appropriate laws to accommodate the needs of the larger populated areas, have kept pace with the growing needs of the industrial centers of the Nations. Thus for more than a half hundred years, it has been the considered opinion of the Legislative bodies of the several states, that embrace the larger industrial and transportation centers of the country, that separate and independent terminal railroad companies should be chartered and franchised to minimize the complexity of converging railway traffic, in the large cities, thus preventing troublesome and delaying bottlenecks in the movements of trains and cars, to save the shipping public the exorbitant cost of over lapping trackage and terminal facilities, as well as the cost incident to long delays in delivery of the commodities shipped, and to lessen the danger of injury to railway employees that is always incident to complexity of movement and congestion of traffic. Both the United States Government, through the Interstate Commerce Commission, and the State Governments, through their respective Railroad Commission, have set up the necessary rules and regulations for the establishment of the proper contract relations between the overland carrier and the terminal company.

The Interstate Commerce Commission of the Federal Government and the Railroad Commissions of the sev-

eral states, are, as governmental agencies, well fixed in the public mind. The Terminal Railroad Company as distinguished from the overland carrier has long been publicly known and recognized as a vital part of the Railroad Industry. In Houston, the Houston Belt & Terminal Railroad Company is no doubt as much in the public mind and the public press as any other Railroad Company. It is safe to say that every railroad man who rides a train into Houston is as aware of the activities and functions of Houston Belt & Terminal Railroad Company, as he is of his own company, and not one of them would ever dream or imagine that it was merely an "agent" of the company for which he worked. Rather they know it as a strong well organized Railroad Corporation itself, rendering services to all railroad companies having need of such services.

The Petitioner in this case, within thirty minutes after the happening of the accident which was made the basis of this suit, filled out an accident report. When he came to the question "to whose fault do you attribute the accident?", he answered promptly, just as any other railroad employee in Houston would have done, *"The Houston Belt and Terminal"*. Likewise, any lawyer in Houston, cognizant of the facts would have made the same answer, but not one of them, (and we include counsel for Petitioner) had he been employed by Petitioner at that time, to enforce his rights, would have conjured up the idea that he had a cause of action against his own employer, the Missouri Pacific Railroad Company.

The Petitioner himself knew, as, every lawyer in Houston would have known, that the fault lay with the Houston Belt & Terminal Railroad Company, and that his

proper and lawful course would be to prosecute his suit against that Railroad Company. It is certain that no lawyer (including the attorneys who nearly three years later, filed this suit) would have advised him that he had a cause of action against his own employer. And it can be likewise correctly asserted that every court in Texas, had the opportunity been presented, would have held that his cause of action lay against the Houston Belt & Terminal Railroad Company, and not against his Employer Company. Both the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, and the Supreme Court of Texas, to whom the question was presented, so held.

Seven members of this Honorable Court have held to the contrary, Mr. Justice Harlan and Mr. Justice Frankfurter, dissenting.

It is certain that every railroad lawyer in the whole United States will feel that the majority view of the Court is wrong. It is highly probable that ninety-five percent of the lawyers generally will agree with the Dissent.

The reason is simple.

The Federal Employee's Liability Act was enacted fifty years ago, when the Railroad Company had a monopoly on the transportation of passengers and freight. Railroad business was a thriving enterprise, and the Nation's top industry. That is not true today. Other giants of industry have grown and are growing, including other and ever expanding modes of transportation. The Railroads have already seen their greatest day. If there were no Federal Employee's Liability Act today, no one would ever think of having one enacted. The one that exists needs no judicial expansion. The public mind has taken cog-

nizance of the plight of the railroads, and the trend is not to slap them in the face but to lend a helping hand.

It is not the time to weaken the economy of the railroads by jeopardizing the existence of the Terminal Companies, which are bulwarks of railroading economy. The justification for the Terminal Company is that it enables one specialized company to own its terminal system, (station yard, switching, and interchange tracks) and to expertly operate said terminal system for several companies, and to make it available to all companies within its territorial jurisdiction.

There is no law in Texas, nor is there any legal concept, that prohibits one Railroad Company from leasing its facilities to another, so as to permit a joint use of such facility by the owner thereof, and by one or more lessee companies. Such transactions are permitted by law. For more than a half a century, as we have herein before pointed out, both our Federal agencies, and corresponding agencies of the several state governments have been recognizing Terminal Companies and dealing with them for what they are, separate, independent legal entities, incorporated Railroad Companies, with definite chartered powers, with full power to engage in the "total enterprise" of operating a terminal company.

It is possible that the delineation of the facts of this case by both the Petitioner and the Respondent in their briefs, heretofore filed, was in such general terms that it was difficult for the Court to "see the forest because of the trees". This thought is prompted by the notes following the end of the Court's opinion showing the basis of concurrence therein by Mr. Justice Clark and Mr. Justice Whittaker.

The following brief statement of the specific facts of this case, as distinguished from the general statements contained in instruments heretofore filed by the parties, ought to clear up any probable misconceptions of the factual basis of this case:

The Petitioner was a cook of the General Manager's special car. When the special car was not in use, it was stored or parked near the Belt's Union Station, on the track adjacent to Texas Avenue which marked the South limit of the Belt's Union Station and tracks. A high iron fence separate this storage or parking track from Texas Avenue. It is not unusual for this special car to remain "parked" on this storage track for a week or two at a time. On the date of the accident, the General Manager had been out on inspection tour. As usual his special car was at the end of the train. Upon arrival of the train in the yard it was backed, as usual, into the station, which made the special car, the first car into the station. After all passengers had disembarked, the train was cut loose from the special car, and it was left standing alone, near the entrance gates to the station. The General Manager and his guests left the car. The Petitioner helped in unloading the General Manager's baggage and that of the General Manager's wife who was a guest on the car. The Petitioner went to the garage at a hotel across the street from the Station, got the General Manager's automobile and drove it back in front of the station, and picked up the General Manager's wife and her baggage, and then acting as her chauffeur, drove her some eight miles or more to her home. The General Manager's train trip was over. He was through with the Special Car until the next unscheduled trip, which might be as long as ten days or two weeks later.

After the Petitioner had returned from the automobile trip to the General Manager's home, he returned to the Station, reboarded the Special Car, which was still standing where it had been originally left after being backed into the Station. The Petitioner still had a few chores to finish, such as cleaning up his pots and pans in the kitchen, and putting away the linen. It was while he was thus engaged, that the Belt's switching crew came backing in with two or three cars preparatory to coupling onto the Special Car and moving it over to its regular parking berth on the track next to the fence by Texas Avenue, and near the Station, where, by contract, or lease agreement it would remain until "the next trip" (R. 27-28, 32). The engineer of the switching crew missed a signal and the sudden jar resulted which caused the injury to the Petitioner.

The majority opinion of this court refers to the "total enterprise" of the Petitioner. The particular "total enterprise" in which the Respondent was engaged that day had been completed for more than two hours. Respondent had no more duty to perform with the Special Car. Under the law it had a perfect right to contract with the Belt for the storage of the car for the ten days or two weeks until it was needed again. Where the Belt chose to park the car, was the Belt's business. It could leave the car where it was or move it over to a spot fifty or a hundred feet away. The Respondent owed no further duty to anybody, the general public or the Petitioner with reference to the car. The parking and the storage of the car was a part of the "total enterprise" of the Houston Belt & Terminal Railroad Company.

We have made this detailed statement of the particular act which the Belt was performing at the time of the accident. Certainly the "storage" of the General Manager's private car, and the parking of it near the station on the "out of the way" track next to Texas Avenue, could not, under any theory, be considered the performance of a *non-delegable duty*. The General Shipping Public could in no wise be involved in such isolated movement.

With reference to the indicated basis of Justice Whittaker's concurrence in the majority opinion of the Court, we call to the Court's attention, the fact that the sole question involved in this case is whether Petitioner should have pursued his common law right of bringing his suit against the Belt, which he could have done in any capacity which would have been compatible with his presence in the Special Car, whether it had been as a passenger, an employee of Respondent or a mere licensee of Respondent, or whether he could bring the suit, as respondent's employee, under the "chance" theory that the Houston Belt & Terminal Railroad Company was one of the "Officers, Agents or Employees" of his own company. A relationship of *Employee* and *Employer* must exist before the Federal Employer's Liability Act can be called into play. The Act is not available to one suing as a passenger.

Having reviewed the facts of this case so as to bring into direct and clearer focus the particular act and performance of the Houston Belt & Terminal Company that is made the basis of this suit, we respectfully request this Honorable Court to further consider the F.E.L.A. as to whether it relates to that act and performance, as distin-

guished from the other larger area of switching activities, such as "the breaking up, and assembly of trains, and the handling of cars in interchange with other carriers." (Page 2 of the "Court's Opinion".)

It would seem most compatible with sound reasoning to test the limits of the F.E.L.A. to see whether its intents and purposes are sufficiently broad to encompass the Houston Belt & Terminal Railroad Company as the "owner of a parking lot," and as an *agent* of the owner who brings his car to the lot for parking. When the owner of an automobile drives his car into a parking lot or garage, and leaves it, he certainly does not thereby constitute the parking lot or garage owner (or attendant) his agent, so as to become liable for the negligent handling of the car in the lot after he (the owner) leaves it.

It is Respondent's position that by the same token, when the Respondent brought its *special car* into the Belt's *parking lot* on the occasion in question, - "got out of it," and left it, to be parked and stored for a week or ten days, Respondent did not by *that particular act* constitute the Belt its agent, so as to become liable for any negligent act which the Belt might commit while parking the car.

This case is just as simple as that. The Respondent could contract with the Belt for this one particular service, the storage and parking of its special car without the approval of any governmental agency. The general public is not involved, the shipping public is not involved. There is no theory under which the Belt, in accepting said car for storage and in parking it in a suitable spot of its own choosing, could be classed as an agent of the Respondent, under the general law. Nor is there any rhyme

or reason to seek to bring into this case the whole range and general area of activities which the Belt performs for the Respondent and other companies. It is apparent that by doing so, this Honorable Court has lost sight of the particular act out of which this case grew. Simple justice demands that Respondent be judged by that particular act, in the light of the law applicable to that particular act. The Petitioner had his right for a day in court and a jury trial under that particular act.

Petitioner respectfully requests this Honorable Court to carefully consider all that is involved in the inescapable truth contained in a statement in Mr. Justice Harlan's dissenting opinion, in which Mr. Justice Frankfurter concurred, to-wit: "This case is a further step in a course of decisions through which the Court has been rapidly converting the Federal Employer's Liability Act, 35 *Stat.* 65, as amended, 45 *U. S. C.*, Pages 51-60 (and the Jones Act, which incorporates the F.E.L.A., 41 *Stat.* 1007, 46 *U.S.C.*, Page 686) into what amounts to a workmen's compensation statute." One of the distressing features of this solemn truth is that all workmen compensation statutes contain reasonable restrictions as to the amounts of recovery, whereas the judicial conversion of the F.E.L.A. leaves the defendant railroad company exposed to the fantastic whims of the average juror who sits in damage suit cases.

The Respondent respectfully submits that the simple facts of this case have been picked up, and mingled in and with an intricate maze of activities that embrace the whole field of terminal railroad business. By so doing the Respondent's rights have been judged in the light of its general relationship with the terminal carrier in that larger

field of activities. Whereas simple justice demands that respondents be judged on the basis of the single transaction that took place on the occasion in question, the storing of respondent's special private car.

The general shipping public is not involved. *Franchise, Powers,* and *non delegable duties* are not involved.

Conclusion

The F. E. L. A. is not involved in a case wherein the Missouri Pacific Railroad Company, a Missouri corporation, backs one of its special private cars into the station owned and operated by the Houston Belt and Terminal Railroad Company, a Texas corporation, and leaves it in the same spot where it was originally placed by Respondent's own crew. By arranging with the Houston Belt and Terminal Railroad Company, to park and store the car for it, the Respondent did not become liable for the negligent act of the Belt in *parking said car* in the spot where it was to be stored,

No question has been raised in any of the courts where this case has been pending regarding the fact that it is controlled entirely by the provisions of the Federal Employers Liability Act. Hence it is obvious that no recovery can or should be had except under the provisions of that Act and within the limitations of that Act.

The opening paragraph of the majority opinion of this Honorable Court, referring to the petitioner says:

> "He recovered a judgment against the respondent in an action brought under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C., Secs.

> 51-60, in the District Court of Harris County, Texas. The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas reversed upon the ground that the FELA did not subject the respondent to liability for injuries of its employee caused by the fault of employees of the Belt Railway. 295 S.W. 2d 508."

The Texas Court of Civil Appeals in the opinion just cited, after stating the nature of the accident in which plaintiff was injured, in its opening paragraph said:

> "The plaintiff subsequently brought this action against the trustee under the Federal Employers' Liability Act, namely, Sections 51 et seq., Title 45. U.S.C.A. to recover damages for these injuries, and no question has been raised concerning the application of this statute to the case."

The plaintiff in his Third Amended Original Petition (Tr. 1, Page 1) made the allegations usual in FELA cases as to plaintiff's employment and his being engaged in interstate commerce, and followed with an allegation that the General Manager on whose car the plaintiff worked, used the car as a medium "to consult with various others of defendants' officers and *agents* such as division superintendents, train masters, road masters and local *agents*, with regard to various phases of the defendants' business". (Tr. 2, Page 2) (Emphasis ours). That "the duties of the plaintiff as a cook for the General Manager were to provide for the comfort, convenience and welfare of the said General Manager, his secretary and such *other agents* of the defendants as might travel with or visit or confer with the said General Manager while he was on and traveling over the defendants' lines in the performance of his

duties." (Tr. Page 3). The language of Section 51 of the FELA (45 U.S.C.) provides for recovery of damages for "injury or death resulting in whole or in part from the negligence of any of the *officers, agents, or employees of such carrier,* or by reason of any defect or insufficiency, due to *its* negligence, in *its* cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Section 53 of the FELA (45 U.S.C.) provides that contributory negligence is not a defense, as at common law, and applies the doctrine of real comparative negligence. Despite the language of the FELA showing that it deals only with the relations between employers and employees, as recognized in the dissenting opinion filed in this Court, the majority opinion goes far afield from the terms and the meaning of the Federal Employers' Liability Act and undertakes to predicate possible liability upon the common law doctrine of respondeat superior and the enlargements of that rule by certain courts. Without undertaking to debate the common law rule and its possible application where the FELA is not the basis of the cause of action, with its limitation as to contributory negligence and the like, we call attention to the fact that court decisions apply the common law *only under the recognized law of the State,* to FELA cases, as for instance in the case of *Miller v. Terminal Railroad Association of St. Louis,* 163 S.W. 2d 1034, Supreme Court of Missouri, certiorari denied.

The majority opinion of the Court cites in footnote 3, page 4, three Texas cases as supporting its conclusion that the Missouri Pacific Railroad Company would have been liable for the acts of Houston Belt & Terminal under the common law doctrine. Not a single one of those cases

deals with any operational functions performed by an independent corporation, such as Houston Belt & Terminal. In fact all of them deal only with the question of whether the employee was working for several railroads involved in each case, instead of merely for the railroad on whose payroll he was carried. Furthermore, in the only Supreme Court decision cited, *GC&SF v. Shelton*, 96 Texas 301, it was expressly stated by the Court that *"there was no evidence of the terms of the contract* between the two railroads *concerning their joint business* at that station". (Emphasis ours.)

> "Under this state of facts the men of the switching crew were equally the servants of both companies, and the plaintiff in error was liable for their acts to the same extent as if they had been employed by it." *GC&SF Railway v. Dorsey*, 66 Texas 148, 18 S.W. 444.

In the *Dorsey* case cited as authority for the decision in the *Shelton* case, supra, it was also stated by the Court:

> "Neither of the defendants, each possessing peculiar facilities for making such proof offered *any evidence of the contract* between the three companies respecting the common yard. Their duties could only be inferred from the use of the premises. About this use there was no conflict in the evidence. The track on which the plaintiff was injured under the arrangement between the companies as evidenced by the use made of it, was as much controlled and owned by appellant as by the other defendant to which it originally belonged." (Emphasis ours.)

In the cited case of *GC&SF v. Shearer*, 21 S.W. 133, the Court of Civil Appeals (no writ of error shown to

have been sought in the Supreme Court) merely dealt with whether the fact that construction work was being done by an independent contractor, entitled the railroad to recover over against the contractor.

In the cited case of *Ft. W. & D. C. Railroad Company v. Smith,* 87 S.W. 371 (writ denied), the Texas Court of Civil Appeals merely held that it was the duty of appellant railroad to furnish appellee a safe place to work "and it cannot escape from the consequences of negligence on the part of one to whom it has given the right to use its yards and tracks."

Certainly no "dominant rule of local law" can be presumed to exist in Texas, contrary to the judgment of the Court of Civil Appeals and the judgment of the Supreme Court of Texas, denying the application for writ of error.

WHEREFORE, Respondent prays that this its Motion for Rehearing be granted, and that the Judgment heretofore entered herein be set aside, and that the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District be affirmed.

Respectfully submitted,

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Attorneys for Respondent

THE STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, this day personally appeared ROY L. ARTERBURY, whose name is subscribed to the foregoing Motion for Rehearing, to me well known, and who, after being by me duly sworn, did depose and say:

"I hearby certify that the above and foregoing Motion for Rehearing is presented in good faith and not for delay."

ROY L. ARTERBURY

SWORN AND SUBSCRIBED BEFORE ME, this _____ day of May, A. D. 1958.

Notary Public in and for
Harris County, Texas

Certificate of Service

I HEREBY CERTIFY that I delivered a copy of the above and foregoing Motion for Rehearing to Mr. C. O. Ryan, attorney for plaintiff, by delivering same to a Clerk in his office, 666 Gulf Building, Houston, Texas, this the _____ day of May, A. D. 1958. In accordance with subparagraph (b) of paragraph three, Rule 33.

ROY L. ARTERBURY